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No. 07-1

Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

STEPHENS COUNTY, GEORGIA SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) allow a governmental entity to be held liable under 42 U.S.C. § 1983 for a constitutional deprivation committed by a non-employee when the governmental entity's affirmative actions create or increase the danger that results in the deprivation?

PARTIES

The Petitioners are Kevin Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child; Abby Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child; Bryan Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child, and Lisa J. Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child.

The Respondent is the Stephens County, Georgia School District.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kevin Dale and Abby Dale, Individually and as the Next Friends and Natural Parents and Natural Guardians of M.D., a Minor, and Bryan J. Carlyle and Lisa J. Carlyle, Individually and as the Next Friends and Natural Parents and Natural Guardians of A.C., a Minor, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 2007.

OPINIONS BELOW

The February 28, 2006 order of the District Court, which is not officially reported, is set forth at pp. 4-47 of the Appendix. The June 27, 2007 opinion of the Court of Appeals, which is unofficially reported at 237 Fed. Appx. 603 (11th Cir. 2007) and 2007 WL 1828304, is set out at pp. 1-3 of the Appendix to this petition. The August 24, 2007 order of the Court of Appeals denying rehearing, which is not published, is set out at pp. 48-49 of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on June 27, 2007. A timely petition for rehearing en

banc was denied on August 24, 2007. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty . . . without due process of law. . . .

STATEMENT OF THE CASE

Petitioners allege, and the evidence shows, that Respondent Stephens County School District (SCSD) affirmatively recommended and deceptively passed on to the White County School District (WCSD) a

male teacher, who SCSD had voted to non-renew following its investigation of allegations of inappropriate touching and other conduct by the teacher towards female students. WCSD relied on SCSD's recommendations in hiring the teacher. The teacher later molested the minor Petitioners, students at WCSD.[1]

The subject school teacher, Joey Wilson, was hired by SCSD to teach third grade at SCSD's Liberty Elementary School in 1998. (App. 6, R5-146-63[2]; R5-147-43). During the 1998-1999 school year, Debbie Allen was a teacher at Liberty Elementary and taught in a classroom across from Wilson. (R3-114-40). Ms. Allen overheard Wilson comment as a female student walked by "that girl will have a nice set of legs on her when she grows up." (R3-114-40-41; R5-143-245). Ms. Allen thought Wilson "was a time bomb waiting to happen with respect to inappropriate physical contact with female students." (R3-114-41-42). Ms. Allen recalled observing Wilson hold female students by the back as they hung their work in the school hallway. (R5-143-246).

During the 1999-2000 school year, Connie Worley was the media specialist at Liberty Elementary and

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[1] The teacher was indicted for child molestation of the minor petitioners and other children (App. 12-13), and soon thereafter committed suicide.

[2] Citations to "R" are to the record on appeal in the Eleventh Circuit.

her daughter, Kathleen Worley, was a middle school student in the SCSD. (R3-114-7-8, 29). While Kathleen Worley was at Liberty Elementary for a book fair, Connie Worley observed Wilson pick Kathleen Worley up and throw her over his shoulder. (R3-114-29-31). Connie Worley felt Wilson's conduct was "inappropriate." (R3-114-30). After the incident, Wilson approached Connie Worley and said "I just had to do that . . . I couldn't help it . . . Who is that?" Ms. Worley replied "[t]hat's my daughter," and Wilson went silent. (R3-114-30).

Also during the 1999-2000 school year, Wilson reportedly commented to a female student "you must be very proud of your underwear because everyone can see it." (R5-143-246-248). Wilson reportedly recommended to another female student that "she wear a bra because the boys would be looking." (R5-150-30-31, 49-50). Finally, Wilson pulled a female student's shirt down and "popped" the student's bra. (R5-150-32-24, 49-50; R3-114-42, 47; R5-143-245-255).

During the 2000-2001 school year, Brenda Duffus was employed with SCSD as a paraprofessional at Liberty Elementary. (R5-150-7-8). Ms. Duffus's daughter, Tamara Duffus, was a student at Liberty Elementary at that time. (R5-150-20). During a school assembly in the fall of 2000, Brenda Duffus and Connie Worley observed Wilson picked up a "mature" female Fifth grade student and placed her over his shoulder "and his hand was between her thigh." (R3-114-49; R5-150-35-37, 49-50). When questioned about the incident afterwards, the female student cried.

(R5-150-35-37, 49-50). Both Brenda Duffus and Connie Worley felt Wilson's conduct amounted to "inappropriate physical contact by Wilson of some sexual nature." (R3-114-63; R5-150-47-48).

Wilson later intentionally touched several female Fifth grade students on their waists and allowed his hands to "slip up under their shirts." (R3-114-61-62; R5-150-38, 49-50). The female students were "very uncomfortable . . . with his hands sliding up under their shirt." (R5-150-38, 49-50).

Connie Worley observed Wilson walking down the hall at Liberty Elementary with a female student drawn very close to him with his arm around the female student. (R3-114-43). A paraprofessional who worked with Connie Worley at SCSD observed Wilson with his arm around a female student, holding the female student "closely and tightly." (R3-114-43).

Wilson reportedly pulled female students aside and engaged in impromptu discussions regarding their menstruation cycles. (R5-150-24-25, 28-29, 49-50). Wilson also engaged in impromptu discussions with two female students involving sexual terminology, including penis, vagina, semen, homosexual, oral sex, and condoms. (R5-143-256-257). In each instance, the subject matter of Wilson's discussions was not part of any curriculum he was responsible for teaching and was done without parental notification or consent. (R5-150-24-25, 28-29, 49-50; R5-143-256-257).

In January or February of 2001, Connie Worley met with Stan McFarlin, Principal of Liberty Elementary, to discuss Wilson's conduct towards his female students. (R3-114-55, 118, 121). During the meeting, Ms. Worley reported all of the conduct of Wilson described above to Mr. McFarlin. (R3-114-58-63). Ms. Worley conveyed to Mr. McFarlin that Wilson's conduct towards his female students amounted to "inappropriate physical contact by Wilson of some sexual nature" and evidenced "blatant signs of sexual harassment." (R3-114-63-66). Ms. Worley told Mr. McFarlin that she felt she needed to speak directly with Dr. McCollum (SCSD's Superintendent) about Wilson's conduct. (R3-114-67). Mr. McFarlin told Ms. Worley that he would like to speak with Wilson before she spoke with Dr. McCollum. (R3-114-67).

In March of 2001, Connie Worley met with Dr. McCollum. (R3-114-71). During the meeting, Ms. Worley related to Dr. McCollum all of Wilson's conduct towards his female students described above and that she had previously related to Mr. McFarlin. (R3-114-71-72). Dr. McCollum told Ms. Worley that an investigation would be started and that Beth Rutherford (SCSD's Human Resources Director) would get back in touch with Ms. Worley. (R3-114-73).

Brenda Duffus also met with Mr. McFarlin in March of 2001 to discuss Wilson's conduct towards his female students. (R5-150-44-45). During her meeting with Mr. McFarlin, Ms. Duffus related all of Wilson's conduct towards his female students described above. (R5-150-38, 49-50). Dr. McCollum

ultimately instructed Ms. Rutherford to conduct an investigation of Wilson's conduct. (R5-143-195, 200-201, 208, 211, 213, 246). Ms. Rutherford summarized her investigation and the overwhelming majority of the conduct outlined was substantiated through that investigation. (R5-143-245-257).

Wilson remained employed by SCSD until SCSD voted in 2001 to non-renew him. (App. 8). SCSD's non-renewal of Wilson came as a result of SCSD's investigation of the complaints of inappropriate touching and other behavior by Wilson detailed above, information which SCSD failed to communicate to Wilson's prospective employer, WCSD, when WCSD made inquiry of SCSD. (R5-143-241-242, 246-257; Pls' Ex. 20; R3-114-32-33, 35, 38-40, 48-51, 58-66, 72; R5-150-21-22, 24-25, 28-29, 30-34, 35-42, 49-50, 72-73). Notwithstanding its actual knowledge of Wilson's conduct, SCSD failed to report Wilson to the Georgia Professional Standards Commission, the Georgia Department of Family and Children's Services, or any law enforcement agency. (App. 8).

Despite SCSD's decision to non-renew Wilson, the SCSD Board of Education voted to accept a letter of resignation from him in lieu of non-renewal. (App. 8; R5-143-261-266; R5-146-93-95, 101, 117-120). This decision to allow resignation was made to protect "the pride of the employee more than anything else," to enable the teacher "to tell fellow teachers that they've resigned." (R5-146-121). Thereafter, in preparation for handling inquiries for employment references relating to Wilson, Dr. McCollum instructed to "not

volunteer information but that [she] should answer the questions specifically asked." (App. 8; R5-143-286, 288; R5-146-129-131).

Thereafter, SCSD was indeed contacted by WCSD's Planning and Personnel Director, Tammy Mize. Despite knowing that Ms. Mize would rely upon the information provided by SCSD in deciding whether to hire Wilson, Ms. Rutherford failed to disclose to Ms. Mize Wilson's conduct toward female students, the fact that SCSD had investigated Wilson, or the fact of SCSD's decision to non-renew him. (App. 8). Instead, Ms. Rutherford told Ms. Mize that Wilson was a "good teacher" and recommended that WCSD hire Wilson (with reservations limited to his abrasive personality which could have caused some personality disputes with other teachers). (App. 8).

In a later conversation with Ms. Mize, Mr. McFarlin described Wilson as "an excellent teacher," and that the principal "hated to see Wilson leave the school and would re-employ him again," and that he "would recommend him" to White County "without reservations." (App. 8-9, R5-144-104). Accordingly, despite circumstances at SCSD which led one SCSD employee to describe Wilson as "a time bomb waiting to happen with respect to inappropriate physical contact with female students," (R3-114-41-42), SCSD deliberately failed to communicate to WCSD both Wilson's acts of inappropriate

sexual behavior and his resignation in lieu of non-renewal. (R5-143-283-286; R5-144-77-81, 91-93, 104, 108).

Wilson was subsequently hired by WCSD, and Ms. Mize testified that she and the Superintendent of WCSD were "shocked" to learn of the information that SCSD had had concerning Wilson, which had not been revealed to WCSD, and that WCSD would not have hired Wilson had they known of that information. (R5-144-80, 159-60).

WCSD hired Wilson, and Petitioners M.D. and A.C. were students in Wilson's Fifth grade class during the 2003-2004 school year at WCSD. Wilson committed physical acts against M.D. and A.C., which resulted in Wilson being indicted in White County for child molestation. (App. 12-13).

In light of the evidence, the District Court held that SCSD could be held liable because "the entity with policymaking authority for SCSD made a decision to cover up Wilson's misconduct." (App. 37). The District Court found that Petitioners must show that the actions of SCSD were "the moving force behind the constitutional violation." (App. 37). The District Court held that Petitioners had created "a genuine issue of material fact that SCSD's alleged policy of concealing Wilson's misconduct showed deliberate indifference to [Petitioners'] constitutional right to bodily integrity and that the policy was the direct cause of [Petitioners'] injury." (App. 38-39). Rejecting

the District Court's finding as to causation and without regard to the obvious danger created by SCSD's actions, the Eleventh Circuit subsequently held that, purely because Wilson was not an employee of SCSD and because SCSD had no control over Wilson when the harm occurred at WCSD, SCSD could not be held liable for Wilson's actions. (App. 3).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE A SPLIT BETWEEN THE ELEVENTH CIRCUIT AND THE OTHER CIRCUITS REGARDING THE "STATE-CREATED DANGER" THEORY OF DUE PROCESS LIABILITY.

In the present case, the Eleventh Circuit held that SCSD could not be held liable for any deprivation of Petitioners' Due Process rights perpetrated by Wilson because, as a non-employee, Wilson was not within SCSD's control. (App. 3). In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989), this Court left open the possibility that a state actor could be held liable for Due Process deprivations where the actor did not employ the individual causing the harm but instead created the danger or rendered the plaintiff more vulnerable to the harm. Specifically, in *DeShaney*, this Court noted that "[w]hile the State may have been aware of the dangers that [the injured child] faced in the free world, **it played no part in their creation, nor did it do**

anything to render him any more vulnerable to them." 489 U.S. at 201 (emphasis added). This language serves as the primary source of authority for what has become known as the "state-created danger" theory of local government Due Process liability ("the theory").[3] Stated succinctly, the theory is that, when state actors knowingly place an individual in danger or actively increase the risk of harm, the Due Process Clause renders them accountable for foreseeable injuries resulting from their conduct. *See Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).[4]

Following *DeShaney*, a majority of circuits have adopted some form of the theory.[5] While formulations of the elements of a claim vary among the circuits,[6] the D.C., Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have recognized

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[3] *But see Kennedy v. Ridgefield City*, 439 F.3d 1055, 1061 (9th Cir. 2006) (suggesting state-created danger theory predates *DeShaney*).

[4] In *Monell v. Dep't of Social Services*, 436 U.S. 658, 692 (1978), this Court explained, under the "cause to be subjected" portion of § 1983, "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort."

[5] For a recent discussion of the conflict between the circuits on this issue, see *Breen v. Tex. A&M Univ.*, 485 F.3d 325, 333-35 (5th Cir. Apr. 24, 2007).

[6] For discussions of the variations of the application of the state-created danger theory among the circuits, see *King v. E. St. Louis Sch. Dist.* 189, 496 F.3d 812, 818 n.3 (7th Cir. 2007) and *Pena v. Deprisco*, 432 F.3d 98, 108 (2d Cir. 2005).

some form of the theory.[7] While the theory was accepted in the Eleventh Circuit for a time, the circuit

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[7] In *Breen*, 485 F.3d at 335 n.5, the Fifth Circuit summarized the positions of various circuits on the theory as follows: "[*Butera*, 235 F.3d at 651] (holding that 'under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when ... officials affirmatively act to increase or create the danger that ultimately results in the individual's harm'); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998) (recognizing state-created danger claim where officials released personal information about undercover officers to the suspects whom the officers were investigating); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ('[W]e hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983.'); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) (stating that 'danger creation' claim is a recognized exception to DeShaney rule); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993) (holding that 'officers may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger'); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (recognizing state-created danger claim where police officers allegedly conspired with group of 'skinheads' to permit them to assault demonstrators); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (recognizing state-created danger claim where police chief allegedly directed officers to ignore victim's pleas for assistance); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (recognizing state-created danger claim where police officers impounded vehicle, arrested driver, and left passenger stranded on roadside in high crime area)." The Fifth Circuit has historically rejected the rule. *See, e.g., Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004). However, following its decision in *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 538 (5th Cir. 2003), the Fifth Circuit has most recently accepted the theory in *Breen*, 485 F.3d at 333-34.

has now expressly rejected it. *See White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999) ("[T]he 'special relationship' and 'special danger' doctrines . . . are no longer good law. . . ."). The First and Fourth Circuits have neither adopted nor rejected the theory.[8]

Although not mentioning it, *eo nomine*, the holding of the Eleventh Circuit in this case and the authority on which it relies, rejects the state-created danger theory. Quoting *Turquitt v. Jefferson County*, 137 F.3d 1285, 1292 (11th Cir. 1998),[9] the Eleventh

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[8] Both circuits have considered whether certain cases meet the elements of state-created danger, but that question has been answered in the negative without either circuit expressly adopting the theory. *See Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005) (" 'This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged.' ") (*quoting Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005)); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) ("We also cannot accept [plaintiff's] attempt to escape the import of DeShaney by characterizing her claim as one of affirmative misconduct by the state in 'creating or enhancing' the danger, instead of an omission.")

[9] In *Turquitt*, a pre-trial detainee was fatally injured in a fight with another inmate who was a convicted felon in a county jail. 137 F.3d at 1286. The plaintiff brought suit against the county. The Eleventh Circuit examined Alabama law and concluded that the sheriff acted as a state official under Alabama law when operating the jail and thus that the state, not the county, had primary control over the jail. In declining to extend liability to the county, the court held in part that "a local government can only be liable under § 1983 for injuries which the government itself caused" and that "causation necessarily implies control." *Id.* at 1292. This holding is at odds with the state-created danger cases which find liability where the state had no control over the actor causing the harm.

Circuit held here that "local governments can **never be liable under § 1983 for the acts of those whom the local government has no authority to control**," and thus that "[SCSD] is not liable under § 1983 for the acts of a former employee whom it no longer had any authority to control." (App. 3) (emphasis added). The rule laid down by the Eleventh Circuit is absolute and without exception.

Under the Eleventh Circuit's analysis, if the actor causing the constitutional deprivation is not within the control of the governmental defendant (e.g., a non-employee), there can be no Due Process liability. Period. This rule that there can never be liability under § 1983 where the individual causing the harm is not in the control of the state defendant places the Eleventh Circuit squarely at odds with other circuits which have allowed for liability under similar circumstances. *See, e.g.*, *Dwares*, 985 F.2d at 98-99 (recognizing governmental liability under the theory where plaintiff's injury was caused by "skinheads"); *Wood*, 879 F.2d at 589-90 (recognizing governmental liability under the theory where plaintiff's injury caused by rapist who picked plaintiff up after a law enforcement officer left plaintiff stranded by the highway in a high-crime area). Given the Eleventh Circuit's implied rejection of the state-created danger theory here (and its express rejection in previous cases), the present case presents this Court with an opportunity to resolve the conflict between the Eleventh Circuit and all other circuits that have accepted this theory. The present case is thus squarely within

the category of cases which qualify for a writ of certiorari under this Court's Rule 10(a).

II. THIS CASE MERITS REVIEW BY CERTIORARI BECAUSE IT INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT REGARDING THE PROTECTION OF CHILDREN FROM SEXUAL ABUSE AND BECAUSE THE ELEVENTH CIRCUIT'S DECISION AFFECTS PENDING CASES.

Obviously, our country places a great priority on the protection of our children. Parents have a constitutionally-protected liberty interest in the care, custody, and management of their children. *See Lehr v. Robertson*, 463 U.S. 248, 258-259 (1983). That sacred constitutional right is accompanied by the government's compelling interest in the protection of our children. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997). This Court, for example, has held that "corporal punishment in public schools implicates a constitutionally-protected liberty interest." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). The federal courts, including the District Court in this case (App. 23), have recognized a student's constitutionally-protected interest in bodily integrity in the school setting.[10] Can

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[10] In, *Hackett v. Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330, 1353-54 (N.D. Ga. 2002), the court cited the following

(Continued on following page)

there be any doubt that students have a constitutional right to be free from the odious abuse which occurred in this case? Does not the law's clear policy of protecting our children dictate that the active concealment of a known history of sexual abuse by a public school teacher should be discouraged, rather than encouraged, even immunized? Does the Eleventh Circuit's decision in this case not have an **opposite** effect from this clear, salutary policy?

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cases regarding a student's right to bodily integrity under the Due Process Clause: "*Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (minor student who had consensual sexual relations with her teacher stated a substantive Due Process claim to be free from bodily harm and sexual molestation); . . . *Plumeau v. Sch. Dist. # 40*, 130 F.3d 432, 438 (9th Cir. 1997) (janitor whose touching of elementary school children constituted criminal sexual abuse also violated the children's Due Process right to bodily integrity); *Doe v. Claiborne County*, 103 F.3d 495, 506 (6th Cir. 1996) (where a 15 year old student had consensual sexual intercourse with her teacher, the panel noted that 'every court of appeals that has had the opportunity to consider the issue has logically recognized that the right to be free from sexual abuse at the hands of a public school teacher is clearly protected by the Due Process Clause of the Fourteenth Amendment'); *Doe v. Taylor Ind. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (minor student who was had [sic] consensual sexual intercourse with her teacher 'clearly was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment'); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (student's 'right to bodily integrity under the Due Process Clause [encompasses] a student's right to be free from sexual assaults by his or her teachers.')."

Unfortunately, instances of school districts and other institutions failing to protect children by withholding information concerning allegations of sexually inappropriate behavior, exploitation or abuse by teachers and others in positions of authority are widespread. By the instant decision, school administrators have now been informed by the Eleventh Circuit that under virtually no circumstances can their school districts be held liable for such harm done to children in other school districts, regardless of the affirmative actions taken by those administrators in causing such harm by "passing on" such identified teachers.

The facts in this case are extreme. A male teacher, who was considered by a fellow teacher to be "a time bomb waiting to happen with respect to inappropriate physical contact with female students," (an assessment more than confirmed by the investigation performed by SCSD) was nevertheless deceptively passed on by one school district to another. SCSD actively conceived and executed a plan to withhold information concerning its investigation and non-renewal of Wilson. More than concealing information, however, the totality of the communications between the two school districts included a principal at SCSD describing Wilson as "an excellent teacher" who the principal "would recommend without reservations" and would "re-employ." The success of this concealment was exhibited not only by WCSD's hiring of Wilson, which WCSD would not have done but for the concealment, but by the "shock" upon WCSD's

Superintendent and Personnel Director upon their learning of the concealed information.

Finally, as evidence that instances of similar actions by other school districts are not rare, the instant decision substantially impacts other litigation of a similar nature presently pending in district courts in the Eleventh Circuit, including *Nicely v. Green et al.*, Civil Action No. CV307-021, pending in the United States District Court for the Southern District of Georgia, Dublin Division, and *Dunlap v. Atlanta Public Schools, et al.*, Civil Action No. 1:07-CV-0464, pending in the United States District Court for the Northern District of Georgia, Atlanta Division.[11] The instant decision has a severe effect upon the well-being of school children whose safety and constitutional rights to protection of their bodily integrity are imperiled. Despite various lower court rulings on this crucially important topic of the safety of children, there is no controlling ruling from our nation's highest court. Accordingly, it is respectfully submitted that this case qualifies for grant of writ of certiorari under this Court's Rule 10(a), the instant decision being in direct conflict with other United States Courts of Appeal on the same important matter. This case further qualifies for certiorari under this Court's Rule 10(c) because it involves "an important question of federal law that has not been, but

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[11] A similar situation was presented in *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001).

should be, settled by this Court," and because it involves "an important federal question in a way that conflicts with relevant decisions of this Court."

CONCLUSION

In this case, SCSD actively concealed Wilson's known history of sexual misconduct, passing him off on WCSD. By concealing Wilson's history and effectively encouraging WCSD to hire Wilson, SCSD created and exposed the minor Petitioners to the very danger of sexual abuse that caused their injuries. In a holding that diverges from the other circuits that have addressed the state-created danger theory, the Eleventh Circuit held that SCSD could not be liable as a matter of law simply because Wilson was a non-employee of SCSD. This case thus illustrates an extremely important divergence between the circuits as to whether the Due Process clause protects our most vulnerable citizens where the state actor creates the danger that causes the constitutional harm. Protection of school children from the type of abuse seen in this case, and resolution of the related split between the circuits, is of sufficient constitutional import to merit review by this Court on certiorari.

For the reasons stated above, Petitioners respectfully submit that the present petition should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14083

D.C. Docket No. 04-00151 CV-2-WCO

KEVIN DALE, individually and as the next friend and natural parent and natural guardian of M.D., a minor child, ABBY DALE, individually and as the next friend and natural parent and natural guardian of M.D., a minor, BRYAN CARLYLE, individually and as the next friend and natural parent and natural guarding of A.C., a minor, LISA J. CARLYLE, individually and as the next friend and natural parent and natural guardian of A.C., a minor,

Plaintiffs-Appellees,

versus

STEPHENS COUNTY, GEORGIA SCHOOL DISTRICT,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Georgia

(Filed June 27, 2007)

Before BLACK, and PRYOR, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM:

Kevin and Abby Dale and Bryan and Lisa Carlyle (Plaintiffs), individually and on behalf of their minor daughters, sued Stephens County School District, the former employer of a teacher accused of molesting their children, on various claims. Stephens County School District appeals the district court's denial of its motion for summary judgment on the only remaining claim against it, the allegations of constitutional violations under 42 U.S.C § 1983.

We review the district court's denial of summary judgment *de novo,* applying the same legal standard as the district court. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 996). A district court should grant a motion for summary judgment if, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. *Id.*

In 2003, plaintiffs accused Joey Wilson of molesting their daughters while he was their teacher in a White County school. Wilson had worked for defendant Stephens County School District for several

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

years before teaching in White County School District. It is undisputed that Wilson was employed by White County School District, not Stephens County School District, when the alleged conduct occurred.

Local governing bodies are subject to suit under § 1983 for monetary, declaratory, or injunctive relief when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978). However, "local governments can never be liable under § 1983 for the acts of those whom the local government has no authority to control." *Turquitt v. Jefferson County,* 137 F.3d 1285, 1292 (11th Cir. 1998) (en banc); *see also DeShaney v. Winnebago County Dep't of Soc. Serv.,* 489 U.S. 189, 197, 109 S.Ct. 998, 1004 (1989); *Shrum v. Kluck,* 249 F.3d 773, 780-81 (8th Cir. 2001); *Doe v. Wright,* 82 F.3d 265, 268-69 (8th Cir. 1996).

We conclude Stephens County School District is not liable under § 1983 for the acts of a former employee whom it no longer had any authority to control. Therefore, we reverse the denial of Stephens County School District's motion for summary judgment and remand to the district court for entry of judgment for Stephens County School District.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

KEVIN DALE and ABBY DALE, Individually and as the Next Friends and Natural Parents and Natural Guardians of M.D., a Minor; and BRYAN J. CARLYLE and LISA J. CARLYLE, Individually and as the Next Friends and Natural Parents and Natural Guardians of A.C., a Minor,

Plaintiffs,

v.

STEPHENS COUNTY (GEORGIA) SCHOOL DISTRICT; STEPHENS COUNTY (GEORGIA) BOARD OF EDUCATION; PATRICIA BAILEY, Individually and in her Official Capacity as Former Superintendent for the STEPHENS COUNTY SCHOOL DISTRICT; BETH RUTHERFORD, Individually and in her Official Capacity as Current or Former Human Resources Director for the STEPHENS COUNTY SCHOOL DISTRICT; STAN McFARLIN, Individually and in his Official Capacity as Current

CIVIL ACTION
NO. 2:04-CV-151-WCO

or Former Principal of LIBERTY ELEMENTARY SCHOOL with the STEPHENS COUNTY SCHOOL DISTRICT; WHITE COUNTY (GEORGIA) SCHOOL DISTRICT; WHITE COUNTY (GEORGIA) BOARD OF EDUCATION; DONNA ALLEGOOD, Individually and in her Official Capacity as Current or Former Principal of MOUNT YONAH ELEMENTARY SCHOOL with the WHITE COUNTY SCHOOL DISTRICT; and ROGER FITZPATRICK, Individually and in his Official Capacity as Current or Former Assistant Principal of MOUNT YONAH ELEMENTARY SCHOOL with the WHITE COUNTY SCHOOL DISTRICT,

Defendants.

ORDER

(Filed Feb. 28, 2006)

The captioned case is before the court for consideration of defendants' motions for summary judgment [109-1, 110-1], plaintiffs' motions to strike [130-1, 134-1], plaintiffs' motions to quash subpoenas [83-1, 88-1], and non-party, the Family Relations Program, Inc.'s, motion to quash subpoenas [85-1].

I. Factual Background and Procedural History[1]

In 1998, Joey Wilson was hired by Stephens County School District ("SCSD") to teach third grade at Liberty Elementary School. Wilson also taught fifth grade at the school. In March 2001, Brenda Duffus, a school paraprofessional whose daughter was a student in Wilson's class, approached Stan McFarlin, the school's principal, with concerns about Wilson's inappropriate sexual conduct toward his female students. Wilson joined the meeting and explained that his behavior was not sexual in nature. McFarlin then instructed him to avoid physical contact with his female students. A few days later, however, Duffus returned with Connie Worley, the school media specialist, and reiterated her concerns about Wilson's behavior.[2]

Worley then took her complaints to the SCSD superintendent, Patricia Bailey, formerly Patricia McCollum. Bailey instructed Beth Rutherford, the human resources director for SCSD, to investigate Wilson's conduct. Rutherford interviewed several

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[1] The recited facts are taken from the parties' statements of material facts and supporting documentation except where otherwise noted.

[2] McFarlin claims that Duffus's original complaint was the first he received about Wilson. Plaintiffs, however, allege that Worley spoke with McFarlin about Wilson's conduct two or three times in January and February 2001 before returning with Duffus in March.

students, parents, and teachers, made notes, and obtained some signed statements.[3] SCSD also placed a paraprofessional in Wilson's classroom to observe him at all times during the investigation. The complaints from Duffus and Worley and the investigation revealed allegations that Wilson had lifted female students onto playground equipment, picked them up and thrown them over his shoulder, massaged their necks and shoulders while they were in class, "popped" a girl's bra, questioned students about their menstrual cycles, and made a comment to another teacher that a fifth grade girl would have "a nice set of legs on her when she grows up."

Wilson was confronted with these allegations by Bailey and Rutherford after the investigation was completed. He provided an explanation for each complaint. Rutherford and Bailey determined that Wilson's behavior was not sexual in nature and that, although it showed "poor judgment," it did not violate SCSD's sexual harassment policy. After presenting the results of their investigation to the Stephens County Board of Education ("SC Board") on March 30, 2001, they recommended that Wilson's employment contract not be renewed.

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[3] Plaintiffs allege that Rutherford failed to interview many of the teachers and parents who had observed Wilson's behavior or any of the students who were on the receiving end of his inappropriate comments and behavior.

The SC Board voted unanimously not to renew Wilson's contract. Instead, Wilson was offered the option of submitting his resignation, which he did on April 4, 2001. The SC Board voted to accept his resignation, and Wilson resigned at the end of the 2000-2001 school year. No one with SCSD reported Wilson's behavior to the Georgia Professional Standards Commission ("PSC"), the Georgia Department of Family and Children's Services ("DFCS"), or any law enforcement agency.

After submitting his resignation from SCSD, Wilson applied for a teaching position with the White County School District ("WCSD"). On April 21, 2001, Tammy Mize, the personnel and planning director for WCSD, contacted Rutherford for an employment reference on Wilson. Bailey had informed Rutherford to answer specific questions regarding Wilson but to avoid volunteering information. Rutherford did not inform Mize about the allegations of Wilson's inappropriate behavior, the investigation of his conduct, or the non-renewal decision regarding his contract. Instead, Rutherford stated that Wilson was a "good teacher" who had "caused some parent complaints" perhaps because of his "sometimes abrasive personality" and who had "some problems getting along with some of the [other] teachers." When asked by Mize if she would recommend Wilson for employment, Rutherford responded that she would but "with reservations."

Seeking a further reference on Wilson, Mize contacted McFarlin, who informed her that Wilson

was "an excellent teacher" and that he would recommend him. Although McFarlin indicated that Wilson had "issues" at the school involving the staff, he too failed to inform Mize about the allegations, the investigation, or the non-renewal decision. Ultimately, Wilson was offered a teaching position as a third grade teacher at White County Elementary School.

During the 2001-2002 school year, Wilson's first year at White County Elementary School, Deborah Anderson, a first year teacher, complained to Donna Allegood, the school's principal, that Wilson made her feel uncomfortable and that he had touched her arm when they were alone. Allegood told Anderson that she should talk to Wilson herself. Anderson also reported to Allegood that Wilson had embarrassed a student by having the other students tell her why they did not want to be her friend. Plaintiffs also allege that Anderson made other complaints at this time to Allegood regarding Wilson's inappropriate behavior toward students, but Allegood denies this.

Also during the 2001-2002 school year, a parent informed Allegood that Wilson would talk only to the mothers of his students, not to the fathers. Allegood was also informed that, after a female student had complained about Wilson touching her hair and hugging her, Wilson informed the entire class that he could no longer push the children on the swings or give them hugs because of this particular student. Plaintiffs allege that several other complaints about Wilson's behavior were made to Allegood and to assistant principal Roger Fitzpatrick during the

2001-2002 school year, but Allegood and Fitzpatrick deny receiving these complaints.[4]

In the 2002-2003 school year, Wilson taught fifth grade. On December 2, 2002, H.C., a female student, and her parents reported to Allegood that Wilson had touched the top of her leg or thigh while he was working with her at the computer. The parents also reported the incident to DFCS, which conducted an investigation. DFCS informed Allegood that the case was closed on January 2, 2003 and that there were no substantial findings. No one from WCSD made any independent investigation of the incident, nor did anyone report it to the PSC. H.C. was removed from Wilson's class, and Allegood counseled Wilson not to touch students on any part of the body where such contact could be perceived as sexual in nature.

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[4] Specifically, plaintiffs allege that Anderson told Allegood that she saw Wilson stroking his female students' hair and observed him sitting on the floor with students lying on his outstretched legs. There is uncertainty as to when Anderson made the latter complaint, and Allegood denies ever receiving the former. Plaintiffs also assert that a parent complained to both Allegood and Fitzpatrick that Wilson massaged the feet and shoulders of his female students and had them massage his feet and shoulders. Allegood and Fitzpatrick deny that the parent complained of this type of behavior. Allegood also denies plaintiffs' allegations that she was informed by a nurse that the "Good Touch/Bad Touch" teacher was concerned with the way Wilson leaned over a student. Furthermore, although plaintiffs allege that Allegood personally observed Wilson allowing his students to rest their heads on his legs, Allegood denies this.

Plaintiffs M.D. and A.C. were both students in Wilson's fifth grade class during the 2002-2003 school year at the new Mount Yonah Elementary School. On September 29, 2003, after being confronted by her parents regarding a cryptic note, A.C. told them that Wilson had been touching her breasts and bottom since the second week of school. That same day, A.C. and her parents, Bryan and Lisa Carlyle, met with Allegood, who promised to speak with Wilson about the allegations. Allegood and Fitzpatrick confronted Wilson, but he denied that the touching was inappropriate and characterized it as inadvertent.

The Carlyles returned that afternoon for a second meeting with Allegood, Fitzpatrick, and Melodie Palmer, the school counselor. The parties are in dispute as to whether A.C. described Wilson as touching her breasts or her stomach. Allegood told A.C. that she must be mistaken about Wilson. When asked whether she wanted to remain in Wilson's class, A.C. said that she did. Although her parents did not want her to return to Wilson's class, the plan was for A.C. to return to his class the following day. Allegood did not report the allegations made by A.C. to anyone on September 29, 2003.

That evening, A.C. told her friend and classmate, M.D., about the meetings with Allegood. M.D. then told her mother that Wilson had been touching her on her breasts and her bottom and that he had made a comment that her shirt showed off her curves. M.D.'s parents, Kevin and Abby Dale, contacted the sheriff's department and called the Carlyles to come to their

home to meet with a deputy. After listening to the allegations and asking a few questions, the deputy wrote an incident report, concluding that the children had been molested.

The next morning, September 30, 2003, the Dales met with Allegood to inform her of M.D.'s allegations regarding Wilson and of their call to the sheriff's department. Allegood then reported the allegations of both girls to Dr. Shaw, the superintendent for WCSD. Shaw and Allegood met with Wilson to inform him of the allegations and that an investigation would be conducted. Shaw instructed Wilson not to touch any students or confront them about the allegations. Shaw also called the sheriff's department at this time. The Dales and Lisa Carlyle met with Shaw and were told that Wilson would remain in the classroom until the investigation was completed. Beginning on October 1, 2003, a paraprofessional was assigned to observe Wilson's classroom on a full-time basis.

On October 1, 2003, A.C. and M.D. were interviewed by the sheriff's department. When they returned to school, Allegood transferred them to another teacher's class. On October 2, 2003, other parents contacted Allegood regarding complaints from their daughters of sexually inappropriate touching by Wilson. Shaw then told Wilson not to return to the school on October 3, 2003 and to stay away until further notice.

On October 2, 2003, Wilson was indicted for one count of child molestation, namely rubbing the inner

thigh of H.C. On October 6, 2003, Wilson was indicted for nine additional counts of child molestation, including acts against A.C. and M.D. as well as acts against two other minors. On October 31, 2003, Shaw initiated the process of terminating Wilson's contract and formally suspended him from his teaching duties pending a termination hearing. In lieu of the hearing, Wilson tendered his resignation.

Plaintiffs brought Title IX claims against both WCSD and SCSD. Plaintiffs also sued WCSD, SCSD, Allegood, Fitzpatrick, Rutherford, McFarlin, and Bailey for violations of plaintiffs' liberty interests under both 42 U.S.C. § 1983 and the Georgia Constitution. Plaintiffs also brought claims against all defendants under 42 U.S.C. §§ 1985 and 1986. In addition, plaintiffs asserted state law claims of negligence and negligence per se against all of the individual defendants for failure to perform their ministerial duties. Plaintiffs also brought parental claims and claims for punitive damages against all defendants. In an order dated December 10, 2004, the court dismissed the Title IX claim against SCSD and the state law claims of negligence and negligence per se against McFarlin. The defendants move for summary judgment on all claims. Plaintiffs responded and moved to strike certain portions of defendants' motions.

Both the Stephens and the White County defendants have served discovery requests on plaintiffs for medical records, including psychiatric records. Plaintiffs object to production of these records based on

psychotherapist privilege. On July 15, 2005, defendants served the Family Relations Program, Inc. ("FRP"), a non-profit organization that has provided counseling services to plaintiffs and a non-party to the litigation, with subpoenas requiring the production of plaintiffs' records on July 20, 2005. The Dale and Carlyle plaintiffs have each filed motions to quash the subpoenas. FRP has also filed a motion to quash the subpoenas. Defendants have filed responses to these motions to quash. During a conference in chambers on August 26, 2005, the court decided to reserve its ruling on these motions to quash until it had considered defendants' motions for summary judgment.

II. Plaintiffs' Motions to Strike

In response to defendants' motions for summary judgment, plaintiffs moved to strike all portions of defendants' motions that address issues other than those which plaintiffs allege defendants informed them would be the basis of their summary judgment motions. Plaintiffs claim that, during the August 26, 2005 conference, the court granted defendants' request to bifurcate discovery after defendants stated that their summary judgment motions would address only limited areas. The court, however, did not bifurcate discovery. To the extent that defendants indicated their intention to limit their motions to issues of liability, plaintiffs reasonably could have expected that defendants meant to address all areas of liability.

Furthermore, plaintiffs' motions to strike are procedurally defective. A motion to strike is applicable only to matters contained in pleadings. Fed. R. Civ. P. 12(f); *see also McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290, 1298 (M.D. Ga. 2003). Motions for summary judgment are not pleadings. *See* Fed. R. Civ. P. 7(a). Accordingly, plaintiffs' motions to strike are **DENIED.**

III. Defendants' Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those claims for which there is no need for a factual determination and for which there is a clear legal basis are properly disposed of through summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *See, e.g., Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). It is important to recognize, however, that this principle does not require the parties to concur on every factual point. Rule 56 "[b]y its very terms . . . provides that the mere existence of *some* alleged

factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Consideration of a summary judgment motion does not lessen the burden on the nonmoving party. The nonmoving party still bears the burden of coming forth with sufficient evidence. *See Earley v. Champion Intl Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). However, it is important to note the difference "between direct evidence and inferences that may permissibly be drawn from that evidence. Where a nonmovant presents direct evidence that creates a genuine issue of material fact, the only issue is one of credibility; thus, there is no legal issue for the court to decide." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). On the other hand, "[a] court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the nonmovant relies, are 'implausible.'" *Id.* at 743. Adopting language from one of its sister circuits, the Eleventh Circuit stated:

> If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's "specific facts" as to other material facts, however,

> may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law. This inquiry ensures that a "genuine" issue of material fact exists for the factfinder to resolve at trial.

Id. (citation omitted). "Where the evidence is circumstantial, a court may grant summary judgment when it concludes that no reasonable jury may infer from the assumed facts the conclusion upon which the nonmovant's claim rests." *Id.*

B. Title IX Claim

Count I of plaintiffs' complaint is brought against WCSD pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"). Title IX provides, in relevant part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Plaintiffs allege that they were subjected to discrimination and harassment because of their sex by Wilson and that WCSD is liable under Title IX for failing to prevent such harassment.

Sexual abuse and sexual harassment by a teacher constitute discrimination under Title IX. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60,

75 (1992). To impose liability against the school district for a Title IX violation, however, the plaintiff must establish that an "appropriate person" had actual notice of the teacher's misconduct and was deliberately indifferent to it. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Defendant WCSD contends that summary judgment is appropriate on the Title IX claim because (1) Allegood was not an "appropriate person" under *Gebser*; (2) no school official had actual knowledge of Wilson's misconduct; and (3) school officials did not act with deliberate indifference.

Although the Supreme Court failed to delineate who is an "appropriate person" within the Title IX framework, it did note that the "appropriate person" must be an official of the school district with authority to address the discrimination and institute corrective measures. *Gebser*, 524 U.S. at 290. The United States Court of Appeals for the Eleventh Circuit has likewise failed to resolve who constitutes an "appropriate person" under *Gebser*. *Davis v. DeKalb County Bch. Dist.*, 233 F.3d 1367, 1372 n. 5 (11th Cir. 2000). Given that the WC Board's Title IX policy designated the school principal as the official responsible for Title IX compliance efforts with regard to students, a reasonable factfinder could determine that, as principal, Allegood had the authority to address the discrimination and institute corrective measures.

Plaintiffs do not contend that WCSD had actual notice of the sexual touching endured by M.D. and A.C. while it was occurring. Instead, plaintiffs argue

that the school district should have known that Wilson was abusing the students based on prior complaints regarding his inappropriate conduct toward other students. Plaintiffs cite to several incidents of Wilson's misconduct that were allegedly reported to Allegood prior to the 2003-2004 school year, including having female students massage his feet and shoulders, leaning over students in a manner that concerned another teacher, touching and hugging students, running his fingers through female students' hair, allowing female students to lie with their heads resting against his legs, and rubbing H.C.'s thigh.[5]

In *Davis*, the Eleventh Circuit addressed the issue of actual notice under Title IX. The plaintiffs in *Davis* alleged that the school district either knew or should have known that the teacher in question was sexually abusing them based on a prior complaint from a student who was not a party to the case that the teacher touched her behind while she was hiking a football to him during a football game and later tried to touch her at the water fountain before she moved away. 233 F.3d at 1372-73. The court found that a complaint of "an incidental touching during an athletic event" and a "perceived imminent touching"

[5] Although the parties are in dispute as to when Allegood became aware of some of these incidents, viewed in the light most favorable to plaintiffs, she knew about them prior to the 2003-2004 school year when plaintiffs were allegedly abused.

was insufficient to constitute actual notice of sexual harassment. *Id.* at 1373.

The Eleventh Circuit also found that the plaintiffs in *Davis* could not establish the deliberate indifference element of their Title IX claim as the school principal instituted corrective measures against the teacher. *Id.* at 1373-75. The principal ordered an investigation, during which the alleged victim, other students, and the teacher were all interviewed. *Id.* at 1373. The school officials determined that the touching was inadvertent. *Id.* The principal also removed the complaining student from one of the teacher's classes, offered to remove her from the other class, and followed up with her to determine whether she had any further complaints. *Id.* In addition, the principal directed the teacher to avoid all out-of-class contact with the student and monitored the teacher for further indiscretions. *Id.* at 1374. The court concluded that the school district "responded with anything but deliberate indifference." *Id.* at 1373.

The Eleventh Circuit also addressed deliberate indifference in *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005). This case involved a sexual relationship between a teacher and a high school student that was ultimately discovered through an explicit note written by the student. Over a period of three years, school officials received a complaint concerning the teacher's relationship with another student, an anonymous e-mail alleging that the teacher had engaged in inappropriate relationships with certain former students, and an anonymous

call from a person who had observed the vehicles of the teacher and the plaintiff parked in the woods. *Id.* at 1281-82. After each complaint, school officials began an investigation, interviewing both the student involved and the teacher, removed the student from the teacher's class, and warned the teacher to refrain from any appearance of impropriety in dealing with students. *Id.* at 1286-87. During the investigations, school officials consulted each other, shared notes from previous investigations, and continued to monitor the teacher for suspicious behavior. *Id.* After the third complaint, the assistant superintendent contacted the PSC to request that it investigate the teacher. *Id.* In light of these corrective measures taken by school officials, the Eleventh Circuit determined that the school did not respond with deliberate indifference to any of the complaints. *Id.*

The prior complaints against Wilson are more severe and more numerous than the complaint lodged against the teacher in *Davis*. If each incident were considered separately as it was reported, these incidents may not have risen to the level of actual notice under *Gebser*. However, the cumulative effect of these complaints should have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students.

Furthermore, Allegood's response to the prior complaints was less diligent than that of the school officials in *Davis* and *Sauls*. Although Allegood removed H.C. from Wilson's class after her complaint and warned Wilson not to touch students inappropriately,

there is no evidence of further investigation by any WCSD official. WCSD cites to the results of the DFCS investigation as evidence of a sufficient response. The school district, however, made no independent investigation to determine whether Wilson was touching other students. The district also failed to follow up with H.C. or to continue to monitor Wilson for further indiscretions. Also, there is no evidence of any investigation or corrective measures taken regarding any of the earlier complaints. In light of the increasingly serious nature of these complaints, WCSD's failure to sufficiently respond constitutes deliberate indifference.

Viewing the evidence in the light most favorable to plaintiffs, the court finds that they have established that Allegood, a supervisor with authority to take corrective action, was placed on notice of Wilson's bad conduct and failed to adequately respond. Accordingly, defendant WCSD's motion for summary judgment is DENIED as to Count I.

C. 4 U.S.C. § 1983 Claims

Counts III and IV of plaintiffs' complaint are brought against the WCSD and SCSD defendants pursuant to 42 U.S.C. § 1983. Plaintiffs claim that Wilson, acting under color of state law, violated their constitutional rights and that defendants acted with deliberate indifference to their complaints in failing to take action to prevent Wilson's conduct.

The Eleventh Circuit has recognized that students have a liberty interest in freedom from unwanted exposure of their bodies in school. *See Thomas v. Roberts,* 261 F.3d 1160, 1168 (11th Cir. 2001), *citing Justice v. City of Peachtree City,* 961 F.2d 188, 191 (11th Cir. 1992) (although students surrender some expectations of privacy when they enter a school, they retain an expectation and privacy interest that they will be free from unconstitutional strip searches). The Fifth Circuit has also ruled that students have a liberty interest in their "bodily integrity" and that a school employee's physical sexual abuse violates that right. *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443 (5th Cir.), *cert. denied, Lankford v. Doe,* 513 U.S. 815 (1994); *see also Hackett v. Fulton County Sch. Dist.,* 238 F. Supp. 2d 1330, 1354 (N.D. Ga. 2002) (Carnes, J.), *citing Doe v. Taylor.* Doe further established that a public school teacher acts under color of state law when there is a sufficient nexus between the teacher's duties and his sexual misconduct toward a student. *Doe,* 15 F.3d at 452 n.4. None of the defendants dispute plaintiffs' contention that Wilson's conduct deprived them of their right to bodily integrity under the Fourteenth Amendment or that Wilson did so under color of state law. Thus, the court assumes that plaintiffs have established a violation of their constitutional right at the hands of a state actor. The court, however, must address whether defendants, none of whom was the immediate perpetrator, may be liable for the deprivation of plaintiffs' rights.

1. Liability of Allegood and Fitzpatrick

Plaintiffs have alleged that defendants Allegood and Fitzpatrick are liable in both their individual and official capacities under § 1983 because they acted with deliberate indifference in failing to prevent the violation of plaintiffs' rights. Allegood and Fitzpatrick claim that they are entitled to qualified immunity because (1) they cannot be liable for Wilson's actions and (2) they did not violate any clearly established right of plaintiffs.

Qualified immunity shields government officials performing discretionary acts from § 1983 liability if their acts do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Jackson v. Sauls,* 206 F.3d 1156, 1164 (11th Cir. 2000) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). To invoke qualified immunity, an official must first prove that the allegedly unconstitutional actions occurred while he or she was acting within the scope of his or her discretionary authority. *See, e.g., Harbert Intl, Inc. v. James,* 157 F.3d 1271, 1282 (11th Cir. 1998); *Evans v. Hightower,* 117 F.3d 1318, 1320 (11th Cir. 1997); *Hudgens v. City of Ashburn,* 890 F.2d 396, 404 (11th Cir. 1989); *Rich v. Dollar,* 841 F.2d 1558, 1563-64 (11th Cir. 1988). To meet this burden, the defendant must show that the challenged actions were undertaken pursuant to the performance of his or her duties and within the scope of his or her authority. *Lenz v. Winburn,* 51 F.3d 1540, 1545 (11th Cir. 1995).

Plaintiffs argue that defendants cannot assert a qualified immunity defense because Allegood and Fitzpatrick's duty to report the complaints against Wilson was ministerial rather than discretionary. A discretionary act is generally characterized as one requiring personal judgment and deliberation and involving an examination of facts. *Miree v. United States,* 490 F. Supp. 768, 774 (N.D. Ga. 1980). A ministerial act, on the other hand, is one that is "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." *Id.* Although the Georgia PSC Code of Ethics for Educators ("Code") required educators to report breaches of standards, including child abuse, child endangerment, and sexual harassment, the Code did not make clear whether educators were required to report all allegations of such breaches.[6] Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a). As the complaints made to Allegood and Fitzpatrick did not contain proof that the alleged unethical conduct occurred, their duty to report these complaints was a discretionary duty requiring investigation and judgment. The court will therefore examine whether Allegood and Fitzpatrick are entitled to qualified immunity.

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[6] The Code requires an educator to "report a breach of one or more of the Standards in the Code of Ethics for Professional Educators as soon as possible but no later than ninety (90) days from the date the educator became aware of an alleged breach." Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a). Thus, the Code does not clearly require an educator to make the report until the educator had some proof of the breach rather than mere allegations.

The first part of the qualified immunity analysis requires the court to determine whether the facts alleged show that the official's conduct violated the plaintiff's constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Plaintiffs' theory of recovery against Allegood and Fitzpatrick rests on supervisory liability. Supervisory liability under § 1983 can be established by a showing that there is a causal connection between the supervisor's actions and the constitutional deprivation. *Braddy v. Fla. Dept. of Labor & Employment Sec.,* 133 F.3d 797, 801 (11th Cir. 1998). A plaintiff may establish such a causal connection by showing a history of widespread abuse sufficient to put the supervisor on notice of the need to correct the deprivation and the supervisor's failure to do so. *Id.* As discussed above, the evidence presented by plaintiffs indicates that Allegood was on notice that Wilson was sexually abusing his students and that her inadequate response constituted deliberate indifference to plaintiffs' rights. Plaintiffs have presented similar evidence showing that Fitzpatrick was also on notice of Wilson's misconduct and that he likewise acted with deliberate indifference. Thus, the court finds that these escalating complaints alleged by plaintiffs constitute widespread abuse sufficient to notify Allegood and Fitzpatrick of the need to stop Wilson's misconduct and that Allegood and Fitzpatrick failed to do so. Thus, it is a genuine issue of material fact as to whether defendants' failure to act deprived plaintiffs' of their constitutional right to bodily integrity.

The second part of the qualified immunity analysis requires a determination that the constitutional or statutory right that was violated was clearly established. Such rights are "clearly established" for qualified immunity purposes if the controlling case law has "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that [the conduct at issue] violates federal law." *Lassiter v. Ala. A&M Univ. Bd. of Trs.*, 28 F.3d 1146, 1149 (11th Cir. 1994). Controlling case law recognizes a student's liberty interest in bodily integrity. *See Thomas,* 261 F.3d at 1168. Furthermore, the law also establishes that supervisory liability can be imposed upon a school official with sufficient notice of a teacher's prior inappropriate acts whose response constitutes deliberate indifference. *See Hartley v. Parnell,* 193 F.3d 1263 (11th Cir. 1999) (court found no supervisory liability for superintendent where there had been no prior accusations of improper behavior by teacher); *see also, Davis,* 233 F.3d at 1373-1376 (court found no liability under § 1983 for principal where prior complaints were not sufficient to give notice of sexual harassment and principal's actions did not constitute deliberate indifference).

As noted above, plaintiffs have presented evidence that Allegood and Fitzpatrick's response to prior complaints about Wilson's misconduct fell far below the level that would have been considered an appropriate response. Plaintiffs have created a genuine issue of material fact that Allegood and

Fitzpatrick had actual notice that Wilson was engaging in sexually inappropriate acts with his students. Plaintiffs have also created a genuine issue of material fact that the officials' failure to fully investigate the claims or to monitor Wilson constituted deliberate indifference. Thus, under *Davis,* defendants had fair warning that school officials who act with deliberate indifference to a teacher's violation of students' constitutional rights can be liable under § 1983. The court concludes that the clearly established law gave Allegood and Fitzpatrick notice that their failure to properly investigate a claim of sexual molestation of a student by a teacher and failure to further monitor the teacher was unconstitutional. Accordingly, defendants Allegood and Fitzpatrick's motion for summary judgment is DENIED as to Count III.

2. Liability of WCSD

Plaintiffs also seek to hold WCSD liable for the deprivation of their constitutional rights. Under § 1983, a government entity cannot be held liable on a theory of *respondeat superior. Monell v. New York City Dept. of Soc. Servs.,* 436 U.S. 658, 694 (1978). Instead, to maintain an action under § 1983 against a governmental entity for an injury inflicted by its employees or agents, a plaintiff must prove that his or her alleged injury stems from an established policy or custom of the government. *Id.* In addition to identifying the municipal policy or custom that caused his injury, a plaintiff must also show that there is a direct causal link between this policy or custom and the

alleged constitutional deprivation. *City of Canton v. Harris,* 489 U.S. 378, 385 (1989). The plaintiff must demonstrate that, "through its *deliberate* conduct, the governmental entity was the 'moving force' behind the injury alleged." *Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 404 (1997) (quoting *Monell,* 436 U.S. at 694).

Deliberate indifference may be shown by evidence that the municipality knew of a need to train or supervise in a particular area and that the municipality made the deliberate decision not to take any action. *Harris,* 489 U.S. at 388-389. Thus, a plaintiff must show either that the municipality had actual knowledge of a need to train or supervise in a particular area or that the need to train or supervise in a particular area was so obvious that the likelihood of constitutional violations was highly predictable. *Gold v. City of Miami,* 151 F.3d 1346, 1351-52 (11th Cir. 1998). The failure to train in such an area may be considered the municipality's policy, and the municipality may be held liable if it actually caused the injury. *Harris,* 489 U.S. at 390.

Plaintiffs argue that WCSD's failure to train defendant Allegood in the area of sexual harassment and the reporting procedures of the PSC and DFCS demonstrates deliberate indifference to plaintiffs' rights. Plaintiffs have presented evidence that WCSD's policies directed students and employees of Mt. Yonah Elementary School to report claims of sexual harassment to Allegood and that she was responsible for Title IX compliance with regard to

students. Plaintiffs' evidence also shows that Allegood did not receive training in the areas of investigating and reporting complaints of sexual harassment and discrimination. Thus, plaintiffs have created a genuine issue of material fact as to whether, given Allegood's responsibility for Title IX compliance, WCSD officials should have known of the need to train her. Plaintiffs have also created a genuine issue of material fact as to whether the alleged failure to train resulted in a violation of plaintiffs' right to bodily integrity. Accordingly, defendant WCSD's motion for summary judgment is **DENIED** with regard to Count III.

3. Liability of Bailey, Rutherford, and McFarlin

Plaintiffs have alleged that defendants Bailey, Rutherford, and McFarlin are liable in both their individual and official capacities under § 1983 because they acted with deliberate indifference in failing to prevent the violation of plaintiffs' rights. The actions challenged by plaintiffs as violating their constitutional rights are failing to report the allegations of Wilson's misconduct to PSC and failing to inform WCSD of these allegations or of SCSD's decision not to renew Wilson's contract. The individual SCSD defendants claim that they are entitled to qualified immunity because they did not violate any clearly established right of plaintiffs.

As noted above, the defense of qualified immunity applies only when government officials are acting within the scope of their discretionary authority. *Haubert Int'l.*, 157 F.3d at 1281-82. Plaintiffs argue that defendants acted outside their discretionary authority when they failed to report Wilson's conduct to the PSC as required under Georgia law. Plaintiffs, however, have failed to point to any law establishing an absolute duty for educators to report allegations of sexual misconduct to the PSC.[7] Thus, defendants' decision whether to make such report was within the scope of their discretionary authority. Likewise, decisions regarding disclosure of information in job recommendations were within defendants' discretionary authority.

Plaintiffs have presented evidence that defendants' passing Wilson to WCSD without warning of

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[7] O.C.G.A. § 20-2-984.2(a) requires superintendents and directors of personnel to report written allegations of particular crimes, including child molestation, to the local board of education. Defendants have presented evidence that Wilson's misconduct was reported to the SC Board as required by this statute. Plaintiffs allege that Bailey, McFarlin, and Rutherford failed to report Wilson's misconduct to the PSC. The duty to report crimes to the PSC, however, falls to the Board itself rather than to any individual officer. O.C.G.A. § 20-2-984.2(b). Furthermore, as noted above, the Georgia PSC Code does not clearly require educators to report mere allegations of child abuse. Rather, it requires educators to report *breaches* of the Code, implying that educators are to report to PSC once they have clearly established that a breach occurred. *See* Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a).

his allegedly deviant past ultimately led to their injuries. Defendants do not dispute that plaintiffs had a right to be free from sexual abuse at the hands of their teacher. Defendants do, however, argue that their conduct did not violate any clearly established law. Indeed, plaintiffs fail to cite any controlling law[8] that would establish that defendants' false recommendation of Wilson and failure to report his actions to the PSC violated their rights. In light of the pre-existing law, the unlawfulness of defendants' conduct was not apparent. *See Hope v. Pelzer,* 536 U.S. 730, 739 (2002). Although officials can still be on notice that their conduct violated established law in novel situations, the state of the law in 2001 did not give defendants fair warning that their failure to report allegations of sexual misconduct by a teacher to the PSC or to another school district where he was seeking employment was unconstitutional. *Id.* at 741.

Furthermore, the court does not find that this case fits within the "narrow exception" under which a defendant may be denied qualified immunity despite the lack of factually similar and controlling case law. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir. 2000) (denying qualified immunity on basis of narrow exception in excessive force case where defendant police officer "ordered and allowed

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[8] In this court, rights are "clearly established" by decisions of the United States Supreme Court, the Eleventh Circuit, or the Georgia Supreme Court. *Hamilton v. Cannon,* 80 F.3d 1525, 1532 n.7 (11th Cir. 1996).

his dog to attack and bite Plaintiff; threatened to kill Plaintiff when Plaintiff kicked the dog in an effort to resist the unprovoked attack; and let the dog attack Plaintiff for at least two minutes"); *see also, Thomas v. Roberts,* 323 F.3d 950, 955 (11th Cir. 2003) (finding defendant teacher's strip search of students without individualized suspicion to find envelope containing twenty-six dollars unconstitutional, but granting qualified immunity due to lack of controlling case law and failure to meet narrow exception). For this narrow exception to apply, a plaintiff must show that "the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." *Smith v. Mattox,* 127 F.3d 1416, 1419 (11th Cir. 1997) (declaring that conduct "barely" qualified for narrow exception where police officer broke the arm of an allegedly docile arrestee who had admittedly previously been fleeing). To come within this exception, the conduct must be "so far beyond the hazy border" between reasonable and unreasonable conduct that the official had to know that he or she was violating the Constitution. *Id.*

Defendants' actions, however, were not so clearly proscribed by the Fourteenth Amendment that the court can say that defendants knew that they were violating the Constitution by concealing Wilson's misconduct from WCSD when contacted for an employee recommendation. Failing to warn a future employer of a prospective teacher's previous sexual

misconduct is not at the very core of what the Fourteenth Amendment prohibits. *See Foucha v. Louisiana,* 504 U.S. 71, 80 (1992) ("[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"). The court finds that defendants' actions, while unethical,[9] were not so egregious that defendants would have realized their unconstitutionality. Thus, these individual defendants are entitled to qualified immunity. Defendants Bailey, Rutherford, and McFarlin's motion for summary judgment is **GRANTED** as to Count IV of the complaint.

4. Liability of SCSD

Plaintiffs claim that SCSD is liable under § 1983 because the school district's policy or custom was to fail to investigate or report the sexual misconduct of teachers and that this constituted deliberate indifference to plaintiffs' substantive due process right to bodily integrity. Defendants, however, argue that

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[9] The court is appalled by the individual defendants' concealment of Wilson's misconduct. Both Georgia state law and the PSC Code place importance on reporting allegations of sexual abuse of students at the hands of teachers. *See* O.C.G.A. § 20-2-984.2; Ga. Prof. Standards Comm'n R. 505-6-.01(3)(b) & (i). Defendants should have known that their failure to disclose to WCSD the allegations of Wilson's misconduct did not conform to the spirit of the law or the ethical code. Nevertheless, the court cannot determine, based on the controlling law, that defendants' ethical failures violated clearly established law under a qualified immunity analysis.

plaintiffs cannot prove a constitutional violation under § 1983 because Stephens County defendants owed no duty to students who were outside their school system.

To hold the school district liable under § 1983 for its failure to protect them from Wilson's abuse, plaintiffs must first establish that the school officials acted pursuant to a policy or a custom of the school district and that such actions were taken with the requisite degree of culpability. *Brown,* 520 U.S. at 404. Thus, plaintiffs must show that there was a clear pattern of sexual abuse by Wilson of which the school district had notice and that its response constituted deliberate indifference. *See Davis,* 233 F.3d at 1376 ("the deliberate indifference standard applies to section 1983 claims basing liability on a municipality's actions in failing to prevent a deprivation of federal rights"). Plaintiffs must also show a direct causal link between the municipal action and the deprivation of their constitutional rights. *Brown,* 520 U.S. at 404.

Plaintiffs have presented evidence that school officials were informed as early as January 2001 of Wilson's inappropriate behavior toward his students. This evidence demonstrates that SCSD had actual notice of Wilson's misconduct. Unlike the WCSD officials, however, SCSD officials investigated these claims, reported their findings to the Board, and placed a paraprofessional in Wilson's classroom to monitor his interaction with students. Plaintiffs, however, assert that SCSD deliberately concealed Wilson's history of sexual abuse and the fact that his

contract had not been renewed, thus facilitating his contact with and continued abuse of students. Plaintiffs cite to SCSD's failure to report Wilson's conduct, its failure to provide WCSD with information that would have removed Wilson from consideration for employment, and its decision to allow Wilson to resign in lieu of terminating him as evidence of a cover-up of Wilson's misconduct. Plaintiffs claim that this cover-up amounted to a policy of deliberate indifference to plaintiffs' constitutional rights.

Here, where plaintiffs allege that the school district is liable for its inaction, plaintiffs must show that the need to act is "so obvious" that the conscious decision not to disclose Wilson's misconduct or the Board's failure to renew his contract amounts to a "custom" or "policy" of "deliberate indifference" to plaintiffs' constitutional rights. *Doe v. Claiborne County,* 103 F.3d 495, 508 (6th Cir. 1996). Plaintiffs have not presented evidence that SCSD had a widespread or pervasive custom of concealing sexual misconduct of teachers. *See Brown v. City of Fort Lauderdale,* 923 F.2d 1474, 1481 (11th Cir. 1991) ("[t]o prove § 1983 liability against a municipality based on custom, a plaintiff must establish a widespread practice that . . . is so permanent and well settled as to constitute a 'custom or usage' with the force of law"). However, under appropriate circumstances, municipal liability may be imposed for a single decision by municipal policymakers. *Pembaur v. Cincinnati,* 475 U.S. 469, 480 (1986). Viewing the evidence in the light most favorable to plaintiffs, a

reasonable fact-finder could determine that the SC Board, as the entity with policymaking authority for SCSD, made a decision to cover up Wilson's misconduct.

With regard to the culpability and causation elements of plaintiffs' claim, plaintiffs must demonstrate that the school district's alleged cover-up was made with "deliberate indifference as to its known or obvious consequences," *Brown,* 520 U.S. at 398, and that the policy was the "moving force [behind] the constitutional violation." *Monell,* 436 U.S. at 694. Thus, SCSD's cover-up must have been highly likely to inflict the particular injury suffered by plaintiffs. *Brown,* 520 U.S. at 410. The culpability standard and the causation standard are intertwined, because "the high degree of predictability may also support an inference of causation – that the [school district's] indifference led directly to the very consequence that was so predictable." *Id.*

Plaintiffs allege that WCSD would not have hired Wilson had they known about his past misconduct and that SCSD officials knew that Wilson was applying for a teaching position with WCSD where he would come into contact with students. Thus, plaintiffs argue that SCSD showed deliberate indifference to the high likelihood that Wilson would continue to molest students and that, but for the school district's cover-up of Wilson's past misconduct, he would not have been in the position to molest plaintiffs. Plaintiffs also argue that SCSD, through its policy of concealment and the recommendations issued under

this policy, caused them to be exposed to Wilson's sexual abuse.

SCSD cites to *Shrum v. Kluck,* 249 F.3d 773 (8th Cir. 2000), in support of its arguments that its conduct did not rise to the level of deliberate indifference and that subsequent sexual misconduct was not so obvious as to impute § 1983 liability to it. *Shrum* involved the molestation of a student by a teacher hired in part based on a neutral letter of recommendation from the superintendent of the school district previously employing the teacher. *Id.* at 780. The letter was written as part of a confidential settlement agreement and there was no evidence that the school district knew that another school district would hire the teacher. *Id.* In the case at hand, however, plaintiffs have presented evidence that SCSD gave a positive recommendation directly to WCSD with the knowledge that it was considering Wilson for employment[10] Plaintiffs have also presented evidence that, had WCSD known of the allegations against Wilson, it would not have hired him. Thus, the court finds that plaintiffs have created a genuine issue of material fact that SCSD's alleged policy of concealing

[10] The court finds defendant SCSD's argument that it had no duty to students outside its school district unconvincing in light of the fact that SCSD had special knowledge when it gave the recommendations that WCSD was considering employing Wilson as a teacher. Furthermore, the court notes that SCSD may have owed some duty to the public in general with regard to passing off an alleged sexual predator onto an unsuspecting school district.

Wilson's misconduct showed deliberate indifference to plaintiffs' constitutional right to bodily integrity and that the policy was the direct cause of plaintiffs' injury. Accordingly, defendants SCSD's motion for summary judgment is **DENIED** with regard Count IV.

D. 42 U.S.C. §§ 1985-1986 Claims

Counts V and VI of plaintiffs' complaint allege that defendants have conspired to deprive plaintiffs of their civil rights and neglected to prevent such a conspiracy in violation of 42 U.S.C. §§ 1985 and 1986.

> The elements of a cause of action under § 1985(3) are: (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Childree v. UAP/GA AG Chem., 92 F.3d 1140, 1146-47 (11th Cir. 1996). To establish a conspiracy claim under § 1985(3), plaintiffs must show an agreement between "two or more persons" to deprive them of their civil rights. 42 U.S.C. § 1985(3). Plaintiffs do not argue that a conspiracy existed between the two counties; rather, plaintiffs argue that defendants within each county conspired among themselves to deprive

plaintiffs of their civil rights. Plaintiffs therefore allege that each county conspired with its employees.

The intracorporate conspiracy doctrine provides that employees of a corporation, acting as agents of the corporation, cannot conspire among themselves or with the corporation. *Dickerson v. Alachua County Comm'n.*, 200 F.3d 761, 767 (11th Cir. 2000). This doctrine has been applied to public, government entities. *Id.* The case at hand involves two separate § 1985(3) claims against actors who are part of two separate single, public entities. Thus, SCSD and its employees are considered to constitute a single legal entity as are WCSD and its employees. *Id.* (county jail and its employees considered single legal entity that cannot conspire with itself); *see also, Chambliss v. Foote,* 562 F.2d 1015 (5th Cir. 1977), *aff'g* 421 F. Supp. 12, 15 (E.D. La. 1976) (intracorporate conspiracy doctrine applied to shield public university and its employees from § 1985(3) civil conspiracy claim).

Plaintiffs, however, argue that their case falls under an exception to the intracorporate conspiracy doctrine because the conspiracy alleged contains a crime. The Eleventh Circuit has recognized that the intracorporate conspiracy doctrine does not apply to alleged intracorporate criminal conspiracies. *See McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038-39 (11th Cir. 2001). Plaintiffs allege that defendants were criminally negligent for their failure to act

to prevent the criminal acts committed by Wilson[11] that deprived plaintiffs of their civil rights. O.C.G.A. § 16-2-1 defines criminal negligence as "an act or failure to act which demonstrates willful, wanton, or reckless disregard for the safety of others who might reasonably be injured thereby."

McAndrew applied the exception to the intracorporate conspiracy doctrine to a claim under 42 U.S.C. § 1985(2) alleging a criminal conspiracy to prevent an individual from testifying in federal court by force, intimidation, or threat. 206 F.3d 1031. Plaintiffs' claim involves an allegedly criminal conspiracy under § 1985(3) where defendants allegedly conspired to interfere with plaintiffs' civil rights. This court declines to extend the criminal conspiracy exception to the intracorporate conspiracy doctrine to a § 1985(3) claim alleging a conspiracy of criminal negligence through failure to prevent a teacher from sexually inappropriate conduct which violated plaintiffs' rights. Thus, plaintiffs' claim under § 1985 is barred.

42 U.S.C. § 1986 claims are derivative of § 1985 claims. *Park v. City of Atlanta,* 120 F.3d 1157, 1159-60. Thus, § 1986 claims require a violation of § 1985. *Id.* As plaintiffs have failed to establish a violation of § 1985, plaintiffs cannot establish a claim under § 1986. Accordingly, defendants' motion for summary

[11] Wilson was indicted for child molestation under O.C.G.A. § 16-6-4.

judgment is **GRANTED** for Counts V and VI of plaintiffs' complaint.

E. State Law Claims

In addition to alleging claims under federal law, Counts III and IV of plaintiffs' complaint allege violations of plaintiffs' liberty interests under the Georgia Constitution. There is no state law version of 42 U.S.C. § 1983 and no private right of action for the alleged violations of the Georgia Constitution. Therefore, the court will address only the state law claims of negligence and negligence per se found in Counts VII and VIII.

1. Liability of WCSD Defendants

In Count VII, plaintiffs allege that defendants Allegood and Fitzpatrick were negligent in failing to perform their ministerial duties required by O.C.G.A. § 20-2-984.2 and the PSC Code. Defendants argue that they are entitled to official immunity. The doctrine of official immunity provides that a public employee will not be personally liable for his discretionary acts unless they are willful, wanton, or outside the scope of his authority. *Gilbert v. Richardson,* 264 Ga. 744, 752 (1994), *citing* Ga. Const. of 1983, Art. I, Sec. II, Par. IX (d). The employee may be held liable for negligent ministerial acts, but immunity is provided to government officials who make policy or exercise discretion in their jobs. *Id.* at 752-53.

O.C.G.A. § 20-2-984.2 requires superintendents and directors of personnel to report written allegations of particular crimes, including child molestation, to the local board of education. Allegood and Fitzpatrick, as principal and assistant principal, are not subject to the law by the plain language of the statute. Thus, neither can be found to have negligently failed to perform his or her ministerial duties under this statute.

The PSC Code applies to all "educators." *See* Ga. Prof. Standards Comm'n R. 505-6-.01. However, as the court noted above in its discussion of qualified immunity for the § 1983 claims against Allegood and Fitzpatrick, the duty for a particular educator to report allegations of a teacher's sexual misconduct to the PSC is discretionary. *See id.* R. 505-6-.01(4)(a). As plaintiffs have failed to show evidence that either Allegood or Fitzpatrick negligently performed any ministerial act or that either acted with malice or intent to injure in performing their discretionary acts, the two defendants are entitled to official immunity. *See Gilbert,* 264 Ga. at 753. Accordingly, defendants' motion for summary judgment is **GRANTED** with regard to Count VII.

2. Liability of SCSD Defendants

Count VIII of plaintiffs' complaint alleges that defendants Bailey, Rutherford, and McFarlin were negligent in failing to perform their ministerial duties as required by O.C.G.A. § 20-2-984.2 and the PSC

Code and that they were negligent in recommending Wilson to WCSD. In an order dated December 10, 2004, the court dismissed this claim against McFarlin and determined that all three defendants were entitled to official immunity for giving the job recommendations. Bailey and Rutherford now claim that they are entitled to summary judgment on plaintiffs' state law negligence claim.

The evidence shows that Bailey and Rutherford investigated the complaints against Wilson and, at the conclusion of their investigation, reported their findings to the SC Board. This evidence demonstrates that defendants fulfilled their duty under O.C.G.A. § 20-2-984.2. Furthermore, Bailey and Rutherford are entitled to official immunity with regard to any alleged negligence in performing their discretionary duties under the PSC Code. Thus, plaintiffs have not presented any evidence that would establish that Bailey and Rutherford have failed to perform any ministerial duty. Accordingly, defendants' motion for summary judgment is **GRANTED** with regard to Count VIII of plaintiffs' complaint.

IV. Plaintiffs' Motions to Quash

In response to defendants' requests for plaintiffs' psychiatric records, plaintiffs and FRP, a non-party to the litigation, move to quash the subpoenas and assert the psychotherapist privilege. The Supreme Court established the psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). Courts

generally agree that a party waives the privilege by putting her mental state at issue. *See Schoffstall v. Henderson,* 223 F.3d 818, 823 (8th Cir. 2000). Courts are split, however, as to the extent to which a plaintiff's mental health must be at issue before finding a waiver of the privilege. *See Stevenson v. Stanley Bostich, Inc.,* 201 F.R.D. 551, 2001 U.S. Dist. LEXIS 16961, *15-*17 (N.D. Ga. 2001). In *Stevenson,* using a "middle ground" approach, Magistrate Judge Scofield concluded that a plaintiff does not put her mental condition at issue by asserting merely "garden variety" emotional damages. *Id.* at *18. He also concluded that the analysis to determine whether a plaintiff has put her mental condition at issue is analogous to the analysis made under Fed. R. Civ. P. 35(a) for ordering a mental examination. *Id.* at *17-*18. In *Turner v. Imperial Stores,* 161 F.R.D. 89, 95 (S.D. Cal. 1995), the court reviewed decisions analyzing Rule 35(a) motions and determined that they are typically granted when one or more of the following factors are present: (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or physical injury or disorder; (3) a claim of unusually severe emotional distress; (4) the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) the plaintiff's concession that her mental condition is "in controversy" within the meaning of Rule 35.

Plaintiffs argue that, as they are seeking only "garden variety" emotional distress damages, they have not put their mental condition at issue. Plaintiffs'

claims seek damages for "mental pain and anguish and injury to their peace, happiness, and feelings, including anxiety, shock, worry, and loss of enjoyment of life" and for "emotional distress, humiliation, embarrassment." [Compl. ¶¶ 85, 88-89, 93, 95-96]. As none of the *Turner* factors are present, plaintiffs' claims are merely for "garden variety" emotional distress damages. Plaintiffs, therefore, have not put their mental condition at issue so as to have waived the psychotherapist-patient privilege. Accordingly, plaintiffs' motions to quash and FRP's motion to quash are **GRANTED**.

V. Conclusion

Based on the foregoing, WCSD defendants' motion for summary judgment [110-1] is hereby **GRANTED in part and DENIED in part**. WCSD defendants' motion is **DENIED** with regard to Counts I and III of the complaint and **GRANTED** with regard to Counts V, VI, and VII. SCSD defendants' motion for summary judgment [109-1] is hereby **GRANTED in part and DENIED in part**. SCSD defendants' motion is **DENIED** as to SCSD's liability under Count IV and **GRANTED** as to to [sic] Bailey, Fitzpatrick, and McFarlin's liability under Count IV. Also, SCSD defendants' motion is **GRANTED** with regard to Counts V, VI, and VIII. Plaintiffs' motions to strike [130-1, 134-1] are **DENIED**. Additionally, plaintiffs' motions to quash subpoenas [83-1, 88-1] and the Family Relations Program's motion to quash subpoenas [85-1] are hereby **GRANTED**.

IT IS SO ORDERED, this 28th day of February, 2006.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14083-II

KEVIN DALE,
individually and as the next friend and natural parent and natural guardian of M.D., a minor child,
ABBY DALE,
individually and as the next friend and natural parent and natural guardian of M.D., a minor,
BYRAN CARLYLE,
individually and as the next friend and natural parent and natural guardian of A.C., a minor,
LISA J. CARLYLE,
individually and as the next friend and natural parent and natural guardian of A.C., a minor,

Plaintiffs-Appellees,

versus

STEPHENS COUNTY, GEORGIA
SCHOOL DISTRICT,

Defendant-Appellant,

STEPHENS COUNTY, GEORGIA
BOARD OF EDUCATION, et al.,

Defendants.

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On Appeal from the United States District Court
for the Northern District of Georgia

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(Filed Aug. 24, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: BLACK and PRYOR, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT
JUDGE

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

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No. 07-691

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In The

Supreme Court of the United States

KEVIN DALE AND ABBY DALE,
INDIVIDUALLY, AND AS NEXT FRIENDS
AND NATURAL GUARDIANS OF M.D., ET AL.,

Petitioners,

v.

STEPHENS COUNTY SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Petitioners have presented any "compelling reason" for this Court to grant their Petition where the Eleventh Circuit's decision in no way conflicts with or departs from any decision of this Court or any other Circuit Court.

II. Whether a school district owes any legal duty to protect unknown students in a completely different school district by revealing unsubstantiated allegations of misconduct involving a former teacher to another school district which may hire that teacher.

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INTRODUCTION

This case presents the question of whether a school district can be held civilly liable for failing to pass along mere allegations of misconduct concerning a former teacher to any future or potential employers, including another school district. This is an accurate characterization of the extreme relief sought by Petitioners against the Stephens County School District ("SCSD"). The legal and practical implications of Petitioners' tenuous liability theory against SCSD is unprecedented and alarming.

Petitioners allege sexual misconduct, abuse and molestation to their minor daughters M.D. and A.C. by White County School District ("WCSD") teacher Joey Wilson during the 2003-2004 school year. Petitioners do not allege, nor have they alleged at any time, any act of molestation or abuse by a Stephens County educator in any Stephens County school, against a Stephens County student. The evidence is undisputed neither M.D. nor A.C. have ever attended school in Stephens County. Indeed, the sum and essence of Petitioners' claims against SCSD is a failure to notify WCSD of certain allegations made against Joey Wilson, which Petitioners claim would have somehow protected their students from harm at the hands of Wilson more than two years later.

Mere negligence by SCSD in failing to provide WCSD with unsubstantiated allegations regarding Joey Wilson cannot establish a cognizable constitutional violation sufficient for SCSD's liability under

42 U.S.C. § 1983. To hold otherwise would be contrary to the well-developed standards of this Court. Furthermore, it would literally open the flood gates for litigation against former employers for a "bad reference."

More importantly, Petitioners have presented no "compelling reason" for their Petition for Writ of Certiorari to be granted by this Court. *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's June 27, 2007 Order is in conflict with any decision of this Court, including *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), or any other decision from any other Circuit Court. Furthermore, Petitioners have failed to demonstrate the Eleventh Circuit decided an important federal question which has not been decided by this Court. *See* Sup. Ct. R. 10 (a)-(c). Petitioners' belief that this particular case "presents an opportunity" for this Court is *not* a sufficient basis for the grant of their Petition. The Petition should be denied.

STATEMENT OF THE CASE

Joey Wilson was hired by SCSD in 1998 to teach third grade. He taught both third and fifth grade in Stephens County, without any incident or complaint, until March of 2001. On March 9, 2001, Brenda Duffus, an elementary paraprofessional whose daughter was also a student in Mr. Wilson's fifth

grade class, approached school Principal Stan McFarlin to discuss Wilson's behavior. (McFarlin depo., R-156-17).[1] Ms. Duffus reported she had heard Mr. Wilson assisted students up on the "monkey bars" on the playground, had massaged the necks of some students while doing their work in class, and discussed with a few of his students whether they had started their menstrual cycles. (McFarlin depo., R-156-19). Mr. McFarlin asked Ms. Duffus if she would be comfortable discussing these allegations with Mr. Wilson present, and Ms. Duffus agreed. (McFarlin depo., R-156-20).

Mr. Wilson joined the two, and Ms. Duffus relayed her concerns directly to Mr. Wilson. Mr. Wilson explained his conduct was his way of encouraging his students. Mr. Wilson also mentioned the female students approached him about questions concerning their menstrual cycles after health class. (McFarlin depo., R-156-21). According to Mr. McFarlin, Ms. Duffus "felt much better" about the situation, and was "satisfied." (McFarlin depo., R-156-22). Mr. McFarlin instructed Mr. Wilson to avoid physical contact with female students, as "perception" could be interpreted as the "truth" by others. (McFarlin depo., R-156-29). Based on his discussion with Mr. Wilson and Ms. Duffus, Mr. McFarlin concluded there was

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[1] Citations to "R" are to the record on appeal in the Eleventh Circuit.

"nothing sexual" intended by Mr. Wilson's comments or conduct. (McFarlin depo., R-156-39).

On or about March 13, 2001, Connie Worley, the school's Media Specialist, approached Mr. McFarlin concerning Mr. Wilson with Ms. Duffus. The two women reported the same complaints Ms. Duffus had relayed to Mr. McFarlin on March 9. (McFarlin depo., R-156-24; Worley depo., R-114-55). Ms. Worley later presented Mr. McFarlin with a typed list of her "concerns" which Mr. McFarlin immediately turned over to Dr. McCollum. (McFarlin depo., R-156-54). Mr. McFarlin told Ms. Worley he would speak with Mr. Wilson. Once again, Mr. McFarlin met with Mr. Wilson and reminded him of his previous request to avoid physical contact with female students, and any perception of impropriety. (McFarlin depo., R-156-58; Worley depo., R-114-59).

Later that same day, Ms. Worley approached SCSD Superintendent Patricia McCollum and reported her concerns about Joey Wilson's behavior. (McCollum depo., R-146-86). Specifically, Ms. Worley reported that several years earlier Mr. Wilson had picked her daughter up and "put her over his shoulders." (McCollum depo., R-146-86). Ms. Worley also reported Mr. Wilson had picked up another student and threw her over his shoulders, in full view of the entire elementary school, at a school "Book Week" event the previous November. (Worley depo., R-114-122). Dr. McCollum informed Ms. Worley the SCSD would conduct an investigation into Mr. Wilson's behavior. (Worley depo., R-114-73).

Prior to March of 2001, neither Dr. McCollum, Ms. Rutherford nor Mr. McFarlin had ever received any complaints of any kind of inappropriate conduct by Joey Wilson. (McCollum depo., R-146-87; Rutherford depo., R-143-58). In light of the complaints received regarding Mr. Wilson, Dr. McCollum met with Ms. Rutherford to discuss the allegations and to begin an investigation pursuant to Stephens County policy. (Rutherford depo., R-143-138; McCollum depo., R-146-90). The Stephens County School Board was also informed of the allegations. (Rutherford depo., R-143-145).

As the investigation proceeded, Ms. Rutherford sent a letter to Mr. Wilson on March 19, 2001, indicating a complaint had been made against him and an investigation would proceed. (Rutherford, depo., R-143-140). Ms. Rutherford interviewed several students, parents and teachers, obtained signed statements from most of those individuals, and made notes throughout her investigation. Stephens County also placed a paraprofessional in Mr. Wilson's classroom full time due to the "very serious investigation" regarding Mr. Wilson's conduct. (Rutherford depo., R-143-148; Worley depo., R-114-74).

Through their investigation, Dr. McCollum and Ms. Rutherford first learned of the concerns and allegations regarding Mr. Wilson. (Rutherford depo., R-143-129; McFarlin depo., R-156-65). They learned Mr. Wilson allegedly had "popped" a girl's bra. However, after Ms. Duffus spoke with the child's parent, the incident was believed to be unintentional as Mr.

Wilson attempted to lift that student up to the monkey bars, and the student's mother was "not concerned." (Rutherford depo., R-143-179). Debra Allen, another elementary school teacher in the system, reported to Ms. Rutherford during the investigation that Joey Wilson reportedly made a comment about a fifth grade girl that she would have "nice" legs on her when she grew up. (Rutherford depo., R-143-185, 222). However, as Mr. Wilson coached a traveling soccer team, this comment could be meant as an evaluation of the athletic potential of the student. (McCollum depo., R-146-181). Ms. Rutherford also learned Joey Wilson carried a female student over his shoulders "like a sack of potatoes" at the November 2000 Book Week presentation, as previously reported by Ms. Worley. (Rutherford depo., R-143-117, 122). None of these allegations had been reported to the Superintendent contemporaneously with the events.

Upon completion of the investigation, Ms. Rutherford and Dr. McCollum interviewed Mr. Wilson about the allegations. (Rutherford depo., R-143-240). Mr. Wilson provided an explanation for each of the separate complaints and allegations. Ms. Rutherford and Dr. McCollum concluded the allegations were not sexual in nature, after an examination of the context and the comment or conduct itself. (Rutherford depo., R-143-197). Even one of the initial complainants – Connie Worley – acknowledged there was no evidence Mr. Wilson's conduct amounted to sexual harassment or abuse. (Worley depo., R-114-86).

After their interview with Mr. Wilson, Dr. McCollum and Ms. Rutherford discussed the entire investigation and whether they would offer Mr. Wilson a contract for the upcoming school year. (Rutherford depo., R-143-261). Dr. McCollum concluded Mr. Wilson's conduct represented "poor judgment," but did not violate Stephens County's sexual harassment policy. (McCollum depo., R-146-186). However, they concluded Joey Wilson was "arrogant," and had committed several "stupid" acts. (McCollum depo., R-146-186). He was also unable to "get along with his fellow teachers" and exercised "poor judgment in situations." (McCollum depo., R-146-95). Therefore, Dr. McCollum presented their investigation to the Stephens County School Board on March 30, 2001, and recommended non-renewal of the teaching contract for Mr. Wilson. (McCollum depo., R-146-93; Rutherford depo., R-143-101). Stephens County offered Mr. Wilson the option of submitting his resignation instead, which he did by written letter on April 4, 2001. (McCollum depo., R-146-121). The Stephens County School District subsequently voted unanimously to accept Mr. Wilson's resignation. (McCollum depo., R-146-123). Mr. Wilson's resignation was effective at the end of the 2000-2001 school year. (McCollum depo., R-1467-125).

Several months later, Dr. Tammy Mize, the Human Resources Director of WCSD, inquired about a reference for Mr. Wilson, as the WCSD was considering hiring Mr. Wilson as a teacher. Stephens County did not have a written policy or practice as to

the "type of referral" the County would provide for a non-renewed employee in search of new employment. (McCollum depo., R-146-108). However, all employees were simply directed to tell the truth when asked about a former employee. (McCollum depo., R-146-130). Dr. McCollum and Ms. Rutherford discussed what kind of reference would be given for Mr. Wilson, and Dr. McCollum instructed Ms. Rutherford to answer the specific questions posed by WCSD. (McCollum depo., R-146-127). Dr. McCollum further advised Beth Rutherford to "tell the truth and answer" the questions by WCSD regarding Mr. Wilson, but avoid "volunteering" information amounting to speculation or unsubstantiated gossip, and to "stick to the facts." (McCollum depo., R-146-130).

Ms. Mize spoke with Ms. Rutherford by telephone on two occasions regarding Mr. Wilson's application for employment. (McCollum depo., R-143-273). During their first phone call, Ms. Rutherford asked that any request for a recommendation or reference be in writing. (McCollum depo., R-143-274). Ms. Mize informed Ms. Rutherford that White County did not "do paper references." (McCollum depo., R-143-276). However, Ms. Mize faxed several written questions to Ms. Rutherford. The questions posed by White County, according to Dr. McCollum, were "very general." (McCollum depo., R-146-128). During their second telephone conversation, Ms. Rutherford invited Ms. Mize to ask her questions about Mr. Wilson. (McCollum depo., R-143-277). Ms. Rutherford informed Ms. Mize that Mr. Wilson encountered trouble

getting along with other staff, and had an abrasive personality. (Rutherford depo., R-143-281; Mize depo., R-144-69). Ms. Rutherford also informed Ms. Mize of "swirling issues" regarding Mr. Wilson. Ms. Rutherford also explained Mr. Wilson had "good and bad" characteristics. (Rutherford depo., R-143-280; Mize depo., R-144-80). According to Ms. Rutherford, Ms. Mize never asked if Mr. Wilson had been recommended for non-renewal with Stephens County, and Ms. Rutherford did not offer that information. (Rutherford depo., R-143-283). However, Ms. Rutherford believed she did not leave Ms. Mize with a "good feeling" regarding Mr. Wilson. (Rutherford depo., R-143-296). Dr. Mize also spoke with Mr. McFarlin concerning Mr. Wilson's employment in Stephens County. When contacted by Ms. Mize and asked why he was not returning to Liberty Elementary, Mr. McFarlin stated Mr. Wilson had "issues" at the school, some of which included staff. (McFarlin depo., R-156-82; Mize depo., R-144-101).

Joey Wilson was ultimately offered a position teaching in White County. Petitioners claim Joey Wilson sexually abused and molested their minor student children, A.C. and M.D., three years later during the WCSD 2003-2004 school year.

REASONS FOR DENYING THE PETITION

Petitioners submit two novel "reasons" for the grant of their writ of certiorari: an "opportunity" for

this Court to resolve a perceived "split" among the Circuit Courts regarding the "state-created danger" theory from *DeShaney*, and to address an "important" question involving the safety of children. (Petition, pp. 10, 15). Neither reason justifies the grant of the Petition whatsoever.

First, the decision of the Eleventh Circuit is simply not in conflict with any decision by this Court or any other Circuit Court. The Eleventh Circuit's reasoning and holding clearly follows this Court's decision in *DeShaney*. Furthermore, it follows factually similar cases decided by the Sixth Circuit in *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) and the Eighth Circuit in *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001) and *Doe v. Wright,* 82 F.3d 265 (8th Cir. 1996). There is no "conflict" between this Court and the various Circuit Courts which were presented with similar situations. Each of those three decisions relied upon this Court's reasoning and holding in *DeShaney*.

Second, in an effort to find some "conflict," Petitioners raise, *for the very first time*, the possibility the "state-created danger" theory may apply. Specifically, a perceived "conflict" among the Circuits somehow justifies their Petition. This Court should look past this effort on the part of Petitioners. The "state-created danger" theory is simply inapplicable, and certainly does not justify the Petition. Finally, while SCSD agrees the protection of children from any sexual abuse is indeed important, this reason alone is

not sufficiently "compelling" to warrant this Court's review of this case under Sup. Ct. R. 10.

I. THE ELEVENTH CIRCUIT'S HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN *DESHANEY* AND ITS PROGENY

The decision by the Eleventh Circuit follows this Court's difficult but clear decision in *DeShaney*, where this Court refused to impose liability on the Winnebago County Department of Social Services for failing to remove a minor child from his father's custody, despite knowledge by the Department of previous abuse to the child. This Court held the Department "had no constitutional duty" to protect the child, because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by *private actors*." 489 U.S. at 196, 201 (emphasis added). This Court further rejected DeShaney's claim the Department had a "special relationship" with the child which imposed an affirmative duty to provide him adequate protection simply because it "knew" the child faced "a special danger of abuse at his father's hands." *Id.* at 197. Instead, this Court reasoned while the Department "may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. This Court ultimately determined the Department's failure to protect the child, "though calamitous in hindsight,"

did not constitute a violation of the Due Process Clause. *Id.* at 202.

Under *DeShaney*, liability cannot be imposed on a state's mere knowledge of an "individual's predicament or from its expressions of intent to help him." *Id.* at 200. The essence of Petitioners' claim is SCSD had specific information and knowledge about allegations of misconduct concerning Joey Wilson, yet did nothing to alert his potential employer, WCSD. Petitioners' claims undoubtedly fail under *DeShaney*. SCSD had no ability to control Joey Wilson's conduct, either at WCSD or elsewhere. He was a "private actor" once he left his employment at SCSD. Furthermore, SCSD had no affirmative duty to warn WCSD or other potential employers given the knowledge and information it had from those reports of misconduct concerning Joey Wilson – *DeShaney* expressly rejected any such an affirmative duty. The Eleventh Circuit's determination SCSD could not be liable for the actions of those "whom the local government has no authority to control" follows *DeShaney* and its progeny, and was appropriate.

Interestingly, Petitioners continuously fail to mention or discuss two factually applicable decisions from the Eighth Circuit, which were cited by the Eleventh Circuit in its Order, and apply the reasoning of *DeShaney*. In *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2000), the Eighth Circuit refused to impose § 1983 liability against a school district and its superintendent after presenting a neutral letter of recommendation to another school district regarding a

former teacher who allegedly touched students and made inappropriate comments. Just as WCSD claims in this case, the subsequent school district which hired the teacher claimed it would not have hired him "if it had known about his prior misconduct." 249 F.3d at 776. Citing *DeShaney*, the Eighth Circuit concluded the original school district could not be held responsible for "failing to warn other potential employers of Kluck's suspected misconduct because the Due Process Clause does not obligate the state to protect an individual against private violence." *Id.* at 781. Additionally, in *Doe v. Wright,* 82 F.3d 265 (8th Cir. 1996), the chief of police of Helena provided a favorable recommendation to Pulaski, a neighboring police department, regarding Wright, a former Helena officer. Wright received complaints of sexual misconduct during his employment in Helena. Pulaski sought a recommendation from the Helena chief, who provided a favorable recommendation and did not disclose the previous complaints against Wright. Wright subsequently committed sexual acts while employed by Pulaski. The Eighth Circuit declined to impose liability against the Helena police chief, as he was not aware the plaintiffs in Pulaski County "faced any special danger, as distinguished from the public at large." *Id.* at 268. Furthermore, following *DeShaney*, the Eighth Circuit concluded the Due Process Clause did not require the Helena police chief to "protect" and warn against potential deeds committed by Wright, a "private actor," in another police department. *Id.* at 269. The *Shrum* and *Doe*

decisions are factually on point, and appropriately applied *DeShaney*.

Petitioners continue to miss the point regarding the "moving force" behind their students' constitutional deprivations. Undoubtedly, their claims are directly attributed to Joey Wilson, and Joey Wilson only. A school district is only liable under § 1983 if the school district itself is culpable. Congress did not intend to impose liability on a municipality unless deliberate action attributed to the municipality itself is the "moving force" behind a plaintiff's deprivation of protected rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1984). Following the principles established in *Monell* and *DeShaney,* the Eleventh Circuit correctly held that "local governments can never be liable under Section 1983 for the acts of those whom the local government has no authority to control." (App. 3). Petitioners have failed to alert this Court of any conflicting decisions of this Court, or any decisions in conflict with or in departure from this well known and recognized standard.

II. THE "STATE-CREATED DANGER" THEORY CITED BY PETITIONERS DOES NOT EVEN APPLY, AND IN NO WAY JUSTIFIES GRANTING PETITIONERS' WRIT.

Petitioners discuss at length the "state-created danger" exception to *DeShaney* as a "reason" for granting their Petition. Petitioners claim the differing

variations on this theory – which is not recognized by this Court, and was not mentioned or even discussed by the Eleventh Circuit in its Order – somehow justifies their Petition *in this case*. The "state-created danger" theory is simply inapplicable. Furthermore, Petitioners' interpretation of the theory is certainly not an appropriate vehicle for this Court to grant their Petition under Sup. Ct. R. 10.

The "state-created danger" theory stems from this Court's discussion in *DeShaney* whereby some Circuit Courts have imposed liability against a state actor in extreme situations if the state actor "created the danger" or rendered an individual "more vulnerable" to harm. Petitioners acknowledge the Eleventh Circuit never even mentioned or discussed the theory in its Order; nonetheless, they claim the Eleventh Circuit "rejects" the theory in principle, and its decision was "squarely at odds" with other Circuits who have allowed for such liability "under similar circumstances." (Petition, p. 15). Perhaps Petitioners have not thoroughly examined the decisions of those Circuits which have recognized the "state-created danger" theory – many of the decisions from those Circuits have refused to impose such liability in educational settings.

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992), the Third Circuit – which recognizes the theory – refused to impose liability against a high school teacher after male students sexually molested female students in her classroom. The female students claimed the

school's failure to report, investigate and stop the physical and sexual misconduct in the classroom "imperiled" them and "increased their risk of harm." *Id.* at 1373. However, the Third Circuit determined the only "recognized risk" was a lack of education; instead, the students' real harm came about "solely through the acts of private persons without the level of intermingling of state conduct with private violence" which supported liability in other cases. *Id.* at 1375. One of the cases examined and distinguished by the Third Circuit in *Middle Bucks* – and cited twice by the Petitioners – was *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). *Wood* involved a police officer who arrested an intoxicated driver and impounded the vehicle, but left the intoxicated driver's female passenger in a neighborhood known for criminal activity at night without any means to travel. The woman was raped by a stranger who offered to take her home. The *Middle Bucks* Court distinguished *Wood* because the victim was known by the officers, and the officer "affirmatively acted *to create the danger to the victims*." *Middle Bucks*, 972 F.2d at 1374 (emphasis added). In *King v. East St. Louis School District*, 496 F.3d 812 (7th Cir. 2007), the Seventh Circuit recently affirmed summary judgment to a school district for a claim made under the "state-created danger" theory.[2]

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[2] As described in *King*, the Seventh Circuit's test for the "state-created danger" theory is "(1) the state, by its affirmative acts, must create or increase a danger faced by an individual; (2) the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the

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The student met with a school counselor at the end of a school day and missed the school bus. She exited the school building and tried to reenter to make a telephone call, but a hall monitor denied her reentry. The student was abducted and raped while walking to a public transportation station. The Seventh Circuit found no liability under the "state-created danger" theory, as the evidence revealed "simple negligence in failing to account for all circumstances that may arise in which a student would seek to reenter the school." *Id.* at 819.

Here, there is absolutely no evidence whatsoever SCSD "created" any inclination or desire on the part of Joey Wilson to assault M.D. and A.C. in an entirely different school district. Even decisions from the Circuits which recognize this exception require a state actor "create" the harm alleged. The Third Circuit requires proof of "affirmative acts" that are the "but for cause" of the risks ultimately faced by an injured party. *Bennett v. Philadelphia,* 499 F.3d 281, 288 (3d Cir. 2007).

Furthermore, the ultimate acts of sexual abuse purportedly committed by Joey Wilson to A.C. and M.D. in WCSD two years later were hardly foreseeable to SCSD. Under the Third Circuit's four part

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individual; and (3) because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience." *King*, 496 F.3d at 817-818.

"state-created danger" test, a plaintiff must prove the harm "ultimately caused was foreseeable and fairly direct," and a "relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts." *Bright v. Westmoreland*, 443 F.3d 276, 281 (3d Cir. 2006). SCSD learned of inappropriate comments about menstruation, incidental touching of a girl's back while raising her up on the monkey bars on the playground, throwing a girl over his shoulders at a book club event in front of the entire school, and making a comment about a soccer player's legs. These specific comments in no way translated into a suggestion or possibility that Joey Wilson would sexually assault students in another school district, as M.D. and A.C. have so alleged. *Assuming* SCSD had some legal obligation to reveal these prior allegations of misconduct, the information conceivably passed along to WCSD would have never alerted WCSD to the possibility Joey Wilson would touch and massage the breasts and buttocks of M.D. and A.C. – which is precisely what they have alleged.

Finally, the evidence reveals SCSD did not do anything to render A.C. and M.D. any more vulnerable to harm, as opposed to any other student in the WCSD, any resident of White County, or any person living in the State of Georgia. Even the Circuits which utilize the "state-created danger" theory require a plaintiff to demonstrate a specific victim, as opposed to the public at large. For example, under the Sixth Circuit's "state-created danger" theory, there

must be evidence the state's actions placed the "plaintiff specifically at risk, as distinguished from a risk that affects the public at large." *Koulta v. Merciez*, 477 F.3d 442, 445 (6th Cir. 2007) (*quoting Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006). Petitioners have never come forth with any evidence SCSD made A.C. and M.D. "more vulnerable" to harm beyond the girls on the soccer team Joey Wilson coached, the children who attended his church, or the young girls who may have lived down the street. While SCSD knew Joey Wilson had at least applied at WCSD, there is no evidence it knew the position, particular school or particular students with whom Mr. Wilson would come into contact. Joey Wilson may have easily been interviewing at numerous school districts throughout the State of Georgia or elsewhere. Was SCSD under an obligation to alert every school district in the State, and perhaps beyond the State of Georgia, that Mr. Wilson was a potential sexual predator based on complaints made to SCSD which were investigated and determined not to be sexual or abusive in any way? *DeShaney* does not mandate any such duty, nor does common sense. The "state-created danger" theory is simply not applicable to this case. Petitioners' exhaustive discussion about a purported "split" between the Eleventh Circuit and other Circuits as an "opportunity" for this Court is unnecessary and inappropriate under Sup. Ct. R. 10. The Petition should be denied.

III. PETITIONERS HAVE SET FORTH NO COMPELLING QUESTION TO BE RESOLVED BY THIS COURT WHICH HAS NOT BEEN SETTLED.

SCSD's very existence is to educate, nurture and protect children. SCSD agrees with Petitioners' statement this Country has an important interest in protecting children. However, Petitioners' use of what amounts to a *cliché* as a legal justification for this Court's review of this case is transparent at best.

Petitioners claim the "facts of this case are extreme." (Petition, p. 17). The facts of *DeShaney* were both egregious and extreme, but this Court refused to impose § 1983 liability against the Winnebago Department of Social Services. Imposing liability against a former employer for not revealing investigations or complaints made against a former employee is even more extreme. An employer – whether it be a school district or private industry – has an interest in conducting investigations into allegations of abuse and wrongdoing. If substantiated, certain legal reporting requirements may warrant disclosure.[3] If

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[3] O.C.G.A. § 20-2-984.2(b) requires certain school officials to report a matter to a local school board if it has a "good faith, reasonable basis" or "evidence" that one of six crimes identified in § 20-2-984.2(a)(1) through (6) was "committed." Any allegations of sexual abuse, molestation or harassment against Mr. Wilson were never substantiated, nor rose to the level or type of conduct required for a report to the PSC for its investigation. The District Court correctly held § 20-2-984.2(b) did not require educators to report "mere allegations of child abuse" but instead

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unsubstantiated, both the former employee and the former employer have an interest in the non-disclosure of such information. A teacher has an interest in avoiding unsubstantiated rumor or circulated innuendo. Employers have an interest in sticking to "the facts," instead of spreading rumor, in order to minimize any potential for slander and libel liability. More importantly, a hiring school district has little interest in hearing of unsubstantiated allegations because they are simply not sufficiently probative of a teacher's likelihood of harming any students in the future. Nonetheless, Petitioners claim SCSD should have informed WCSD of Joey Wilson's "history of sexual misconduct." (Petition, p. 19). The "passing" of such information would have undoubtedly exposed SCSD to defamation liability from Wilson, as such reports would have been false. Even one of Joey Wilson's initial complainants – Connie Worley – acknowledged there was no evidence Mr. Wilson's conduct even amounted to sexual harassment or abuse. (Worley depo., R-114-86). The suggestion by Petitioners that SCSD had a constitutional obligation to reveal unsubstantiated allegations of misconduct to a former teacher's potential employer is "extreme." No precedent of this Court, the Eleventh Circuit, or any other Circuit requires a school district to disclose mere allegations of misconduct, particularly when

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"*breaches* of the Code" to the PSC once they "have clearly established that a breach occurred." (App. 31, n. 7, emphasis in original).

they were investigated and found to be without merit. To hold otherwise would open the door for liability against previous employers for inaccurate or incorrect "references." Accordingly, this case does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, Respondents ask this Court to deny the Petition for the Writ of Certiorari.

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IN THE
Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

STEPHENS COUNTY, GEORGIA SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

I. THIS CASE PRESENTS AN INTER-CIRCUIT CONFLICT REGARDING A QUESTION OF SUBSTANTIAL IMPORTANCE

This case presents a recurring question left unresolved by the decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989)--whether the Due Process Clause is violated when a government entity's action creates or increases a danger that results in the deprivation of life or liberty.

DeShaney held that the Due Process Clause does not impose on the states a general obligation to protect the life, liberty, and property of the public at large. 489 U.S. at 195. The Court explained, however, that such an obligation could arise out of the special duty of care and protection owed to prisoners and others whose ability to provide for themselves has been limited by official action. 489 U.S. at 198-99. *DeShaney* did not resolve whether, in addition to such individuals with whom the state has a special relationship, the protections of the Due Process Clause might apply in other discrete circumstances. The court's opinion, however, repeatedly stressed that the state in *DeShaney* "played no part in creating" the danger that resulted in the serious injuries to the victim in that case. 489 U.S. at 197; see *id.* at 201 (state "played no part in the [ ] creation" of the dangers"; state "played no part in creating" the danger).

In the wake of *DeShaney*, the courts of appeals have reached conflicting conclusions regarding whether a Due Process violation might arise in a case in which, unlike *DeShaney* itself, the state had indeed

created or increased the danger to an individual and by so doing had caused a deprivation of liberty or life. That is the issue framed and resolved by the litigation in the court below. The petitioners alleged that respondent Stephens County School Board, by withholding information regarding misconduct by Joey Wilson, had led the White County School Board to hire Wilson as a teacher, putting Wilson in a position in which he was able to molest petitioners M.D. and A.C.

In the court of appeals, respondent asserted that *DeShaney* required dismissal of petitioners' complaint, insisting that under that decision the allegations of the complaint--even if true--did not constitute a constitutional violation.[1] Petitioners argued in response that respondent's action was unconstitutional because the conduct of the Stephens County School District "[u]nlike *DeShaney*, . . . rendered the minor Plaintiffs vulnerable to Wilson when they otherwise would not have been."[2] The Eleventh Circuit sustained respondent's *DeShaney* argument.

Even if the School District's actions had indeed created the danger (and thus led to the injury) in question, the Eleventh Circuit held, the District could not be held liable because the danger was posed by, and the injury was inflicted by, an individual who at the time of the injury was not an agent or employee of the District. "[L]ocal governments can never be liable . . . for acts of those whom the local government has no

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[1] Brief of Appellant Stephens County School District, pp.15-17.

[2] Brief of Appellees Kevin and Abby Dale, et al., p.20.

authority to control." (App. 3)(*quoting Turquitt v. Jefferson County*, 137 F.3d 1285, 1292 (11th Cir. 1998)(en banc)). That holding of the Eleventh Circuit effectively barred any Due Process claim based on a state-created danger, because in such cases the injury is invariably at the hands of an individual "whom the local government has no authority to control." In adopting this bar the Eleventh Circuit expressly relied on *DeShaney*. (App. 3).[3] In this Court respondent insists that *DeShaney* indeed precludes such state-created danger claims.[4]

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[3] Other circuits, in holding to the contrary that a government entity can violate the constitution by creating a danger of violence by a private party, have insisted that *DeShaney* itself established that rule.

> The Supreme Court has declared, "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney* . . . . However, in *DeShaney* the Court recognized two exceptions, known as the "special relationships" and "state created danger" exceptions."

Beck v. Wilson, 377 F. 3d 884, 889 (8th Cir. 2004).

[4] Br.Op. 10 ("The Eleventh Circuit's reasoning and holding clearly follows from this Court's decision in *DeShaney*"), 11 ("The decision by the Eleventh Circuit follows this Court's . . . decision in *DeShaney*"), 12 ("Petitioners' claims undoubtedly fail under *DeShaney*. SCSD had no ability to control Joey Wilson's conduct . . . . The Eleventh Circuit's determination SCSD could not be liable for the actions of those 'whom the local government has no authority to control' follows *DeShaney* . . . ."), 14 ("Following the principles established in . . . *DeShaney*, the Eleventh Circuit correctly held that local government can never be liable under Section 1983 for the acts of those whom the local government has no authority to control.'")

The Fifth Circuit too has held that *DeShaney* does not permit the imposition of liability because a state-created danger caused a deprivation of life or liberty. *Farr v. Rodriguez*, 2007 WL 4260940 *3 (5th Cir., Dec. 5, 2007)("Farr also asserts a claim for a 'state-created danger' . . . , but we have refused to recognize that theory."); *Longoria v. Texas*, 473 F. 3d 586, 593 n. 8 (5th Cir. 2006)("Longoria . . . argues that his rights were violated under a state-created-danger theory. This circuit has never sustained a § 1983 claim predicated upon the state-created danger theory, and we decline to do so today. . . . [W]e have explicitly rejected this theory of liability."); *Beltran v. City of El Paso*, 367 F. 3d 299, 307 (5th Cir. 2004)("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability . . . ."); *Rivera v. Houston Ind. School Dist.*, 349 F. 3d 244, 249 (5th Cir. 2003)("we have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . . We again decline to do so.")

On the other hand, eight circuits have adopted the state-created danger theory, expressly holding that that doctrine applies in cases in which--as in the instant case--the created danger concerned risk of injury by, and the harm was indeed inflicted by, a person whom the state defendant "ha[d] no authority to control." In general "courts have used the 'state created danger label' to describe the state's duty to protect a person from *private* violence when the state itself has placed that person at risk." *Pena v. Deprisco*, 432 F. 3d 98, 108 (2d Cir. 2005)(emphasis added). See *id.* at 108-11 (constitution violated if "state officials communicate to a *private person* that he or she will not be arrested,

punished, or otherwise interfered with while engaging in misconduct likely to endanger the life, liberty or property of others")(emphasis added); *D.R. v. Middle Bucks Area Technical Schl.*, 972 F. 2d 1364, 1374 ("[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriment in terms of exposure to danger"), 1375 (state-created danger involves a significant "level of intermingling of state conduct with *private* violence")(emphasis added) (3d Cir. 1992)(en banc)(opinion joined by Alito, J.); *Kallstrom v. City of Columbus*, 136 F. 3d 1055, 1066 (6th Cir. 1988)("[l]iability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to *private* acts of violence.")(emphasis added); *Stevens v. Umstead*, 131 F.3d 697, 704 (7th Cir. 1997)(state-created danger doctrine is an "exception to the no duty to protect individuals from actions of *private* actors rule")(emphasis added); *James ex rel. James v. Friend*, 458 F. 3d 726, 729 (8th Cir. 2006)("Generally, the due process clause does not require the state to protect an individual against *private* violence. . . . The state is required, however, to protect individuals who . . . are subject to a state-created danger.")(emphasis added); *Kennedy v. City of Ridgefield*, 439 F. 3d 1055, 1061 (9th Cir. 2006)("although the state's failure to protect an individual against *private* violence does not generally violate the guarantee of due process, it can where the state 'affirmatively place[s] the plaintiff in a position of danger.'")(emphasis added); *United States v. Koon*, 34 F. 3d 1416, 1447-48 (9th Cir. 1994)(in the Ninth Circuit state-created danger cases "the third persons who inflicted the victims' injuries, in fact, were not state

actors"); *Moore v. Guthrie*, 438 F. 3d 1036, 1042 (10th Cir. 2006)("The danger creation doctrine makes a state official liable for the *private* violence of third parties if that official created the danger that caused the harm and the official's conduct was conscience shocking.")(emphasis added); *Butera v. District of Columbia*, 235 F. 3d 637, 651 (D.C.Cir. 2001)("under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from *third-party* violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm.")(emphasis added).

The two Eighth Circuit cases relied on by respondent both concluded that under *DeShaney* government entities may violate the constitution by creating a danger of injury by private parties. *Shrum v. Kluck*, 249 F. 3d 773, 781 (8th Cir. 2001)("This court has recognized two exceptions to the state's exemption from protecting its citizens from the deeds of *private* actors . . . (2) when the state is responsible for placing an individual in a position of danger which otherwise would not exist.")(emphasis added); *Doe v. Wright*, 82 F. 3d 265, 268 (8th Cir. 1996).

The inter-circuit conflict regarding the state-created danger doctrine is well recognized. The First Circuit noted that several circuit courts have recognized the existence of a

> constitutional violation when, on particular facts, the state fails to protect against *private* violence under this state created danger theory. . . . One circuit has flatly rejected the theory.

> *See Beltran v. City of El Paso*, 367 F. 3d 299, 307 (5th Cir. 2004).

Rivera v. Rhode Island, 402 F. 3d 27, 35 (1st Cir. 2005)(emphasis added). In *Pena v. Deprisco*, the Second Circuit pointed out that although

> a majority of our sister circuits . . . recogniz[e] that a state created danger can be the basis of a substantive due process violation . . . . the Fifth Circuit has confined liability to situations involving "special relationships described by the Supreme Court [in *DeShaney*], which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'" *Beltran v. City of El Paso*, 367 F. 3d [at] 307.

432 F. 3d at 108 and 109 n. 12.

In addition to this conflict over whether the Due Process Clause can be violated by a state-created danger, "there is considerable variation among the circuits in their application of the state-created danger doctrine." *King v. East St. Louis School Dist. 189*, 496 F. 3d 812, 818 n. 3 (7th Cir. 2007). "[T]he circuit courts have yet to construct a unified approach either to the state-created danger inquiry or to the role that causation should play in the analysis." *Kennedy v. City of Ridgefield*, 439 F. 3d at 1074 (Bybee, J., dissenting). For example, several circuits that have adopted the state-created danger doctrine have held that the constitution is violated by such conduct only if the government's action is so egregious as to "shock the conscience." *Pena v. Deprisco*, 432 F. 3d at 112-14; *Bright v. Westmoreland County*, 443 F. 3d 276, 281 (3d Cir. 2006); *Moore v. Guthrie*, 438 F. 3d

at 1042. The Ninth Circuit, however, has held that the constitution is violated by danger-creating government action that manifests deliberate indifference. *Kennedy v. City of Ridgefield*, 439 F. 3d 1055, 1064 (9th Cir. 2006). In *Hart v. City of Little Rock*, 432 F. 3d 801 (8th Cir. 2005), the Eighth Circuit applied a deliberate indifference standard, and criticized the Sixth Circuit for having improperly applied a negligence standard. 432 F. 3d at 808 (the Sixth Circuit in *Kallstrom v. City of Columbus*, 136 F. 3d 1055 (6th Cir. 1998) "erroneously applied a negligence standard instead of the subjective deliberate indifference standard").

> While all of these tests share the key element of State endangerment, namely, affirmative conduct by State actors, . . . they are inconsistent in their elaborations of the concept. For example, the circuits have adopted different nexus requirements, . . . and employed different degrees of specificity in defining actionable conduct.

Butera v. District of Columbia, 235 F. 3d at 654.

Uncertainty about the scope of the state-created danger doctrine has led to a series of sharply divided en banc decisions. See *D.R. v. Middle Bucks Area Vocational Technical Schl.*, 972 F. 3d at 1377 (dissenting opinion joined by Judges Sloviter, Mansmann, Scirica and Nygaard), 1384 (dissenting opinion by Judge Becker); *Pinder v. Johnson*, 54 F. 3d 1169, 1179 (4th Cir. 1995)(en banc)(dissenting opinion joined by Judges Russell, Ervin, Murnaghan and Michael); *Kennedy v. City of Ridgefield*, 440 F. 3d 1091, 1091-92 (9th Cir. 2006)(Tallman, Kozinski, O'Scannlain, Kleinfeld, Gould,

Bybee, Callahan and Bea, JJ., dissenting from denial of rehearing en banc).

Respondent contends that *DeShaney* mandated the holding of the Eleventh Circuit, and thus effectively bars invocation of the state-created danger doctrine. Respondent relies on the statement in *DeShaney* that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." (Br. Op. 11, *quoting DeShaney*, 489 U.S. at 195). But this passage means only that the Due Process Clause does not contain such a *general* requirement applicable in all situations; it does not mean that the Clause never imposes such an obligation. *DeShaney* itself expressly recognizes that there is at least one type of situation in which the government has just such an obligation; there is a constitutional duty to protect from invasion by private actors the lives and liberty of individuals in state custody. "In *Youngberg v. Romeo*, 457 U.S. 306 (1982), we [held] . . . that the . . . Due Process Clause requires the State to provide involuntarily committed patients with such services as are necessary to ensure their 'reasonable safety' from . . . others." 489 U.S. at 199. *Youngberg* upheld, inter alia, the claim of the plaintiff in that case that the state was obligated to protect him from injuries inflicted by mentally retarded residents of a state institution, individuals who themselves clearly were "private actors." *Youngberg*, 457 U.S. at 310; see *Hutto v. Finney*, 437 U.S. 678, 682 (1978)(constitutional violations in prison included failure to protect inmates from stabbings and rape by other inmates).

Respondent insists that "many of the decisions from those Circuits [recognizing the state-created danger doctrine] have refused to impose such liability in educational settings." (Br. Op. 15). To the contrary, neither of the cases relied on by respondent held that the state-created danger doctrine can never be applied to the actions of school officials. In *D.R. v. Middle Bucks Area Vocational Tech. Schl.*, 972 F. 2d 1364 (3d Cir. 1992)(en banc), the court expressly applied that doctrine to the claim against the defendant school, rejecting the claim in that particular case only after concluding that the evidence failed to demonstrate that the school's conduct had "created or increased plaintiffs' risk of danger." 972 F. 2d at 1375. Similarly, in *King v. East St. Louis School Dist. 189*, 496 F. 3d 812 (7th Cir. 2007), the Seventh Circuit held that a school board could indeed be found liable for creating a danger to a student if its conduct was "shocking [to] the conscience." 496 F. 3d at 818. The court of appeals concluded that no constitutional violation had occurred in that specific case only because the action of the responsible school officials was no worse than "simple negligence." 496 F. 3d at 819.

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Respondent contends that it could not have foreseen that its actions, in withholding information from and recommending Wilson to the White County School District, would result in injury to petitioners M.D. and A.C. (Br. Op. 18). The district judge, however, concluded there was a "genuine issue of material fact that SCSD's alleged policy of concealing Wilson's misconduct shows deliberate indifference to plaintiffs' constitutional right

to bodily integrity and that the policy was the direct cause of plaintiffs' injury." (App. 38-39). Although respondent appealed this aspect of the District Court decision, the court of appeals dismissed the complaint without reaching that fact-bound dispute. If the Court grants review and upholds the legal sufficiency of petitioners' claims, respondent would be free on remand to renew this challenge to the sufficiency of the evidence.

The alleged sexual molestation which gave rise to the instant case also is the subject of the claims in *Dale v. White County School Board*, No. 07-691. Although the questions presented in these two cases are distinct, the underlying factual disputes are inextricably intertwined. Neither defendant yet acknowledges that petitioners M.D. and A.C. were molested; however, a trial of those claims would likely air a looming dispute between the two school districts as to which of the districts was primarily responsible for the injuries to petitioners.[5] Under these circumstances, we urge the Court to grant certiorari in both cases and set them for argument in tandem.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

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[5] Respondent Stephens County School District suggests that the information it withheld was so unimportant that it would "have never alerted WCSD to the possibility" that sexual molestation might occur. (Br. Op. 18). In deposition testimony, however, an official of the White County School District insisted that District would never have hired Wilson had it had the suppressed information. Deposition of Tammy Mize, pp. 79-80, 203-05.

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